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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAY MANNING, in his official capacity as Director of the Washington Department of Ecology, the WASHINGTON DEPARTMENT OF ECOLOGY, and the STATE OF WASHINGTON,

Defendants.

NO. CV-04-5128-AAM

STATE'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiffs have launched a facial challenge to the Cleanup Priority Act (CPA). To succeed, they must demonstrate there are no potentially valid applications of the statute. Plaintiffs cannot meet this difficult standard of proof.

Neither of Plaintiffs' Supremacy Clause arguments concerning preemption and sovereign immunity have merit. Many of the arguments regarding preemption are not ripe. To the extent they are ripe, the arguments fail for two reasons. First, the "field" occupied by Congress under the Atomic Energy Act (AEA) is narrower than argued by Plaintiffs. It does not include the areas regulated by the CPA: the cleanup of radionuclides released to the environment, and the management of the *solid or hazardous waste* component of mixed waste. Second, the CPA does not conflict or interfere with federal law. The cleanup of released radionuclides has nothing to do with Congress' aims in enacting the AEA. To the extent the CPA's regulation of solid or hazardous waste incidentally affects the federal management of AEA materials, it is entirely within existing authority and is the type of incidental regulation consistently approved by the courts.

The Plaintiffs' sovereign immunity arguments also fail. As interpreted by Ecology, the operative provisions of the CPA only apply to material that is "solid waste" within RCRA's waiver of sovereign immunity. Further, the CPA does not discriminate against Hanford as a federal facility in violation of RCRA's waiver. Instead, the CPA operates uniquely upon Hanford because Hanford is unique in the scale of its environmental and waste management problems.

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Plaintiffs' other constitutional arguments are equally unpersuasive. The CPA's waste import moratorium (Section 4) does not violate the Commerce Clause. It does not discriminate against interstate commerce because it neither advances economic protectionism nor provides benefits to Washington citizens that are denied to out-of-state citizens. Because the CPA does not discriminate, the Court applies the *Pike* balancing test. *Pike* is satisfied here because the CPA only incidentally burdens commerce through its regulation of contaminated sites. These incidental burdens are outweighed by the State's strong interest in protecting the health and safety of its citizens.

Next, the United States cannot establish that Sections 7 and 9 are invalid. Contrary to the United States' arguments, Section 7 does not require dissemination of privileged deliberative information. Rather, Section 7 is a valid requirement for disclosure of objective budgetary information to help the State determine whether responsible parties can meet their cleanup obligations at contaminated sites. The surcharge required by Section 9 funds public participation, which is an integral part of effective cleanup. The surcharge is permissible because it does not discriminate against federal functions and is structured to produce revenues that will not exceed the total cost to the State of the regulatory services being provided.

Last, TRIDEC's Contract Clause claim is singularly weak. TRIDEC lacks standing to allege impairment of Hanford's Tri-Party Agreement (TPA or HFFACO), a consent order to which neither TRIDEC nor any of its members are parties. Even if it had standing, the terms of the TPA defeat TRIDEC's claim. To

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the extent TRIDEC may have standing with respect to other contracts, it fails to make a threshold showing that the CPA substantially impairs such contracts. TRIDEC's claims of impairment are based on an interpretation of the CPA that Ecology has no intention of implementing.

The Plaintiffs are not entitled to summary judgment on any of their claims. Therefore, their motions should be denied. Although the State has not separately moved for summary judgment, the Court should dismiss the Plaintiffs' complaints if the Court finds that the Plaintiffs have failed to establish facial invalidity of the Cleanup Priority Act under their theories.

II. STATEMENT OF THE CASE

A. Background Facts

The Washington State Department of Ecology (Ecology) regulates hazardous waste management facilities pursuant to its authority under the state Hazardous Waste Management Act (HWMA) and federal authorization through the Resource Conservation and Recovery Act (RCRA). Any Washington facility that treats, stores, or disposes of hazardous waste is subject to state permitting under Washington's Dangerous Waste Regulations, Chapter 173-303 WAC. Facilities that handle dangerous waste mixed with radioactive components (i.e., mixed waste) are fully subject to the State's regulatory authority.

There are five mixed waste facilities in Washington: (1) the Puget Sound Naval Shipyard, operated by the United States Navy; (2) Pacific Eco Solutions (PEcoS), a private commercial facility; (3) Framatome, a private facility that stores

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its own waste on-site; (4) Energy Northwest, a joint operating and municipal corporation; and (5) the Hanford Nuclear Reservation. Moore Aff. ¶ H. Currently, both the Hanford and Framatome facilities are contaminated. Skinnarland Aff. ¶¶ J, K.

By far, Hanford is the State's largest and most contaminated mixed waste facility. Hanford poses complex cleanup problems that are unparalleled at other facilities. It is nationally recognized as a "nightmare" site within the Department of Energy (DOE) complex. *See* Watson Aff., Ex. 1 (*Denver Post* editorial describing Hanford as "the worst nightmare"). Despite Hanford's severe contamination, DOE proposes to ship new waste to Hanford before it cleans up the waste already there.

The volume of untreated waste at Hanford is staggering. Fifty-three million gallons of mixed hazardous and radioactive waste resulting from reprocessing of irradiated fuel rods is stored in 149 underground single-shell tanks and 28 underground double-shell tanks in Hanford's 200 Area. The single-shell tanks, which currently hold some 30 million gallons of waste, are not now, nor have they ever been, compliant with applicable tank standards under RCRA. In many cases, these tanks are more than 40 years past their 20-year design life. DOE estimates that approximately 1,000,000 gallons of high-level mixed waste have already leaked from these tanks into the environment. Cusack Aff. ¶ G.

In the early 1970s, DOE decided to bury all low-level (including mixed low-level) waste in the 200 Area at an area known as the Low-Level Burial Grounds. As of 1995, DOE had either disposed of or "retrievably stored" 440,000

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cubic meters of low-level and transuranic waste in unlined trenches at the Low-Level Burial Grounds, which is enough to fill 2,200,000 55-gallon drums. The drums are being stored under conditions in which corrosion is expected because of alternate periods of moisture and dryness in the soil. In fact, some of the burial grounds containing wastes have been subject to periodic flooding. Ecology is aware of at least one release to the surrounding environment from these trenches (of carbon tetrachloride, a hazardous waste constituent). Cusack Aff. ¶¶ I, Q.

DOE does not know the nature of much of Hanford's untreated wastes because the wastes have not been "designated" to determine what, if any, hazardous constituents are present and how those constituents will affect the safe storage, management, treatment, and disposal of the waste. Cusack Aff. ¶ P. For example, much of the waste at the Low-Level Burial Grounds was disposed of prior to the effective date of RCRA. It could very well contain hazardous constituents as well as radiological constituents. In trying to determine what constituents are in its waste, DOE is beset by inaccurate, incomplete, or lost recordkeeping. Wilson Aff. ¶ K. Recently, Ecology learned that DOE attached arbitrary waste labels to waste containers rather than determine the actual contents of the waste. DOE has had similar difficulties with waste verification, which involves the process of determining the constituents contained in wastes shipped from other sites. Wilson Aff. ¶ J.

Effective treatment of a great deal of Hanford's waste, including Hanford's tank wastes, has been stymied because DOE has failed to implement a technology

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to treat the radioactive component of the waste. The radioactive component thus holds a huge quantity of hazardous waste captive without a pathway to treatment. Because the radioactive and hazardous wastes are inextricably combined, the State cannot force the cleanup of the hazardous wastes until the problem of the radioactive component is resolved. Cusack Aff. ¶ M.

DOE is now building a massive Waste Treatment Plant to vitrify tank waste (i.e., turn it into glass) for eventual disposal in a deep geological repository. However, the project is plagued by budget and management problems, as described in a 2005 Army Corps of Engineers independent report that predicts that DOE will not be able to meet its 2011 deadline to begin treating the waste. Cusack Aff. ¶ T. The report also predicts that completion of the plant will be delayed by four years, assuming that DOE gets an approximate yearly budget of $690,000,000 to proceed with construction. Cusack Aff. ¶¶ T, U. However, for Fiscal Year 2006, DOE was appropriated $164,000,000 less than needed to even proceed along this schedule. Even if the Waste Treatment Plant were to remain on schedule, it would not begin treating Hanford's tank waste until 2011; would only treat 10 percent of the waste by volume and 25 percent by radioactivity by 2018; and would not complete the treatment (assuming the addition of further low-activity treatment capacity) until 2028. The State's ability to address hazardous waste treatment is delayed for as long as the treatment of the radioactive portion is delayed. Cusack Aff. ¶ U.

In addition to exerting regulatory authority over the hazardous components of mixed waste, the State also exerts authority over cleanup of contamination caused

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by releases of wastes into the environment. Over 170 square miles of groundwater beneath the Hanford Site is contaminated by hazardous and radioactive waste, out of which almost half (about 80 square miles) exceeds state and federal drinking water standards by several magnitudes. Some of the contaminated groundwater plumes are exceptionally large, with the maximum size more than 130 square kilometers. Many of the contaminated plumes extend vertically downward to more than hundreds of feet. Some of these plumes are still expanding. Goswami Aff. ¶ D.

A number of contaminants such as chromium, nitrate, strontium-90, tritium, and uranium have reached the Columbia River. Other contaminants such as carbon tetrachloride and technetium-99 may reach the river in the future. DOE currently lacks effective technologies to remediate and restore the current contamination levels in Hanford groundwater, especially with respect to the long-lived radionuclides and mixed waste. Goswami Aff. ¶ E.

The massive contamination and treatment challenges at Hanford led to the negotiation in 1989 of the Tri-Party Agreement (TPA) among DOE, the United States Environmental Protection Agency (EPA), and Ecology. The TPA constitutes an enforceable schedule to bring DOE into compliance with various federal and state environmental laws. Cusack Aff. ¶ J. DOE will remain out of compliance with applicable laws at least until all of the "milestones" in the TPA are met. Wilson Aff. ¶ E.

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Since adoption of the TPA, DOE and its contractors have incurred over 70 written notices of violation of state and federal hazardous waste laws. Wilson Aff. ¶ G. As a result, DOE and Hanford are registered in EPA's database as a Significant Non-Complier which is reserved for exceptionally poor performance and/or recalcitrant or repeat violators. Wilson Aff. ¶ H.

Against this troubling backdrop, nearly 70 percent of Washington voters voted to enact Initiative 297, the Cleanup Priority Act. The CPA works in conjunction with the Tri-Party Agreement by plugging in gaps where the TPA is silent. *See* Cusack Aff. ¶ K. In addition to supplementing the Tri-Party Agreement, the CPA works in conjunction with the HWMA and RCRA and, in fact, derives its authority from these existing laws. The CPA does not create new powers that the State did not already possess. Rather, the CPA eliminates the State's discretion in deciding how to use its existing powers. In short, the CPA mandates that "[t]he department of ecology shall regulate mixed wastes to the fullest extent it is not preempted by federal law[.]" RCW 70.105E.040(1).

B. Certification to the State Supreme Court and Ecology's Interpretation of Key Provisions of the Cleanup Priority Act in Light of the Supreme Court's Decision

On December 1, 2004, the United States filed a lawsuit in this Court alleging that the Cleanup Priority Act was facially unconstitutional. On January 12, 2005, the United States filed a summary judgment motion. The United States' motion relied on interpretations of the CPA that the State disputed. These disputes prompted the State to request certification of eight questions to the Washington

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Supreme Court. On February 8, 2005, this Court granted the State's motion. The Washington Supreme Court accepted the certified questions and issued its decision on July 28, 2005.

In resolving the certified questions, the Washington Supreme Court agreed with the State's interpretation in regard to four of the questions and agreed with the United States' interpretation in regard to the remaining four questions. Specifically, the State argued and the Court found: (1) that the CPA does not extend to pure radioactive materials; (2) the CPA does not prohibit intra-site movement of waste among various units at a facility;[1] (3) the definition of "actual characterization" in Section 6 of the CPA does not require physical inspection of each material disposed of in unlined trenches; and (4) sections of Washington statutes may be severable even without a severability clause.[2] The Supreme Court agreed with the United States that: (1) the definition of mixed waste in the CPA could encompass materials that do not designate as dangerous waste under state law; (2) the mixed waste definition could also encompass materials that do not qualify as RCRA solid wastes; (3) the CPA's definition of mixed waste is broader than the definition under

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[1] In the Supreme Court, the United States took positions contrary to its positions in earlier briefing to this Court by conceding that the CPA does not extend to pure radioactive materials and does not prohibit intra-site movement of waste. Thus, the Supreme Court found those items were not in dispute and accepted the State's interpretations.

[2] After certification by this Court, the State agreed to forego any attempt to speculate as to which portions of the CPA might be severable if some portions of it are invalidated. Thus, the parties asked the Supreme Court to answer the narrower question of whether the lack of a severability clause in the CPA means that sections are not severable.

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existing law, thereby expanding regulated materials under the CPA; and (4) the naval exemption in Section 8 of the CPA exempts only the shipment of sealed nuclear reactor vessels and compartments to Hanford. *United States v. Hoffman*, 154 Wash.2d 730, 116 P.3d 999 (2005).

After the Supreme Court's decision, Ecology reconsidered the scope and applicability of each substantive section of the CPA. Most sections of the CPA are ambiguous and susceptible to two or more interpretations. In adopting what Ecology believes to be the best interpretation of each section, Ecology adhered to the Supreme Court's directive that the statute must be interpreted in light of its plain language and the statute's mandate that Ecology shall only regulate to the extent that it is not preempted by federal law. RCW 70.105E.040(1). These same principles should guide this Court in determining whether Ecology's interpretations are supported and, if so, whether the interpretations can sustain the Plaintiffs' facial challenge to the statute.

Ecology's interpretations of key subsections of Sections 4 and 6, which are central to the Plaintiffs' arguments, are set forth below.[3] Discussion of other sections and subsections of the statute are included throughout the briefing and contained in affidavits submitted by Ecology personnel.

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[3] The CPA is codified at Chapter 70.105E RCW. The version of the initiative contained in the voters' pamphlet is attached to Laura Watson's affidavit as Exhibit 2. Because the parties refer to certain sections of the CPA according to the sections assigned in the voters' pamphlet, this version of the CPA is being provided for ease of reference.

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1. Interpretation of Section 4: mixed waste import moratorium

Section 4 prohibits receipt of off-site waste by a "facility" unless the facility possesses a final facility permit for all units that treat, store, or dispose of mixed waste. RCW 70.105E.040. Subsections 4(2) and 4(6) are the key provisions for implementing the off-site moratorium. Subsection 4(2) prohibits any facility owner or operator of a site that stores, manages, processes, transfers, treats, or disposes of mixed wastes from importing to the facility any additional mixed wastes not generated at that facility until the facility has obtained a final facility permit for all of its mixed waste units. Subsection 4(6) prohibits Ecology from issuing or modifying a permit for the treatment, storage, or disposal of mixed wastes that are not generated on-site as part of a cleanup action until the site or facility is in full compliance with RCRA and HWMA closure requirements for a facility or unit from which a release of hazardous substances has occurred, or until Ecology issues a formal determination under the Model Toxics Control Act (MTCA) stating that no other action is necessary to remedy the release.

Section 4 applies only to "facilities." Under the CPA, "facility" is defined as having the same meaning as defined by the HWMA: "all contiguous land and structures, other appurtenances, and improvements on the land used for recycling, storing, treating, incinerating, or disposing of *hazardous waste*." RCW 70.105.010(11) (emphasis added); RCW 70.105E.030(4). "Hazardous waste" is defined as "all dangerous and extremely hazardous waste, including substances composed of both radioactive and hazardous components." RCW 70.105.010(15).

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A facility under the CPA, therefore, is a facility that manages hazardous waste as defined by the HWMA.

Section 4 operates within the existing scope of permitting authority under the HWMA and RCRA. Specifically, the moratorium remains in place only until the affected facility obtains a final facility permit "under chapter 70.105 RCW, this chapter, and [RCRA.]" RCW 70.105E.040(2). The HWMA and RCRA permitting scheme is set up to govern management, storage, and disposal of hazardous wastes, as that term is defined by preexisting law. The HWMA and RCRA have no mechanism to govern useful products or materials that are not, at a minimum, solid waste under the statutes. By placing the Section 4 permit within an existing permit scheme rather than creating an entirely new permitting system, Section 4 is self-limiting: it governs only those materials that were already regulated as hazardous waste through the permitting provisions of the HWMA and RCRA.

Read together, Subsection 4(2) prohibits a facility from importing additional off-site mixed wastes until it obtains a final facility permit, while Subsection 4(6) precludes Ecology's authority to issue such a permit to a facility that is non-compliant or currently undergoing remedial action. Thus, in order for the moratorium in Section 4 to apply, two prerequisites must be met: (1) there must be a facility that does not possess a final facility permit for all of its mixed waste units; and (2) the facility must presently be out of compliance with regulatory standards or have an un-remediated release of hazardous substances. Unless both conditions are met, Section 4 does not apply.

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2. Interpretation of Section 6: ban on waste disposal to unlined trenches where mixed waste is present

Subsection 6(1) of the CPA requires Ecology to issue an order to any site owner or operator utilizing burial grounds or landfills where mixed wastes are present. The order must contain the following five directives: (1) cease disposal of all further wastes into unlined soil trenches or facilities within 30 days; (2) initiate an investigation to provide Ecology with an inventory based on actual characterization of all hazardous substances potentially disposed in unlined trenches; (3) initiate an investigation of releases or potential releases of hazardous substances disposed of in unlined trenches; (4) prepare or pay Ecology to prepare a plan for waste retrieval, treatment, closure, and monitoring for the unlined trenches; and (5) install a HWMA and RCRA compliant groundwater and soil column monitoring system. RCW 70.105E.060(1).

Subsection 6(1) applies to: (1) any *site* owner or operator (2) utilizing landfills or burial grounds with unlined soil trenches in which mixed wastes are believed to have been buried. Both conditions must be met for Subsection 6(1) to apply.

"Site" is defined more broadly than "facility" under the CPA:

> "Site" means the contiguous geographic area under the same ownership, lease, or operation where a facility is located, or where there has been a release of hazardous substances. In the event of a release of hazardous substances, "site" includes any area, or body of surface or ground water, where a hazardous substance has been deposited, stored, disposed of, placed, migrated to, or otherwise come to be located.

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RCW 70.105E.030(14). Since Subsection 6(1) applies to *sites* rather than *facilities*, it is possible that this subsection will capture sites that are not captured as facilities under Section 4. Thus, an entity could receive an order under Section 6 even if that entity is not subject to the moratorium in Section 4.

III. STANDARD OF REVIEW

The Plaintiffs have moved for summary judgment in their facial challenge. In doing so, they must meet both the standards for summary judgment and the high burden imposed on a party challenging a statute that has never been implemented. Because facial challenges to statutes generally involve pure issues of law, they are usually appropriate for summary judgment. *See United States v. Prosperi*, 201 F.3d 1335, 1342 (11th Cir. 2000).

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987). *Salerno* is based on limitations on the scope of the judicial power, as well as broader separation-of-powers principles. Declaring a statute unconstitutional "is the gravest and most delicate duty" that a court may perform. *Blodgett v. Holden*, 275 U.S. 142, 148 (1927). Thus, the power to do so "is not to be exercised with reference to hypothetical cases thus imagined[.]" *United States v. Raines*, 362 U.S. 17, 22 (1960). Federalism concepts also support the *Salerno* rule in cases such as this one where a plaintiff asks a federal court to

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invalidate a state statute in its entirety before a state has had the opportunity to apply the statute in a manner to avoid constitutional infirmities. *See New York v. Ferbe*r, 458 U.S. 747, 768 (1982); and *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (noting that the invalidation of a statute "prohibit[s] a state from enforcing the statute against conduct that is admittedly within its power to proscribe").[4]

Salerno provides a workable standard by which a court can evaluate the validity of a challenged statute. If a court must determine whether a statute is invalid in all potential applications, it would have to "consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation," *Barrows v. Jackson*, 346 U.S. 249, 256 (1953) and make a judgment based on the hypothetical application of the statute. The *Salerno* standard obviates the need to speculate about possible valid applications of an untested law by focusing on whether a single valid application exists.

If the State can demonstrate possible constitutional applications of the statute, the Plaintiffs have failed to meet their burden. In that instance, it is the State that is entitled to summary judgment. *See, e.g., Portsmouth Square v. Shareholders Protective Comm.*, 770 F.2d 866, 869 (9th Cir. 1985) (court may enter summary judgment for a non-moving party). Because this case presents pure issues of law, and Plaintiffs cannot meet their burden of establishing a facial challenge, the State

[4] This argument regarding facial challenges to statutes tracks arguments made in an amicus brief recently submitted by the United States in *Ayotte v. Planned Parenthood of Northern New England*, Supreme Court No. 04-1144**,** 2005 WL 1900328 (Jan. 18, 2006). In *Ayotte*, the United States argues that the *Salerno* standard should apply when reviewing facial challenges to state abortion laws.

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is entitled to dismissal of the Plaintiffs' complaints.

IV. RESPONSE TO SUPREMACY CLAUSE ARGUMENTS

Plaintiffs argue the CPA is invalid in its entirety because it violates the Supremacy Clause in two respects. First, the Plaintiffs argue that the CPA is preempted by regulating within the "occupied field" of the Atomic Energy Act (AEA), and is impliedly preempted by regulating in conflict with the AEA. U.S. Br. at 35 and *passim*. Second, the Plaintiffs argue that the CPA regulates materials and activities at a federal facility beyond the waiver of sovereign immunity in RCRA, 42 U.S.C. § 6961(a), by regulating materials that are not "solid waste" (including AEA radionuclides) and by applying heightened regulation to a federal facility (Hanford). U.S. Br. at 50-57.

Plaintiffs cannot sustain a facial challenge under either argument. With respect to field preemption, the CPA only directly regulates AEA radionuclides in one section and in one instance. Direct regulation occurs only through Subsection 5(1), and only then if the AEA radionuclides have been released to the environment. As argued below, this instance of direct regulation is outside the "occupied field" of the AEA. In all its other applications, the CPA only *incidentally* affects AEA radionuclides through the exercise of RCRA-authorized authority over solid and hazardous waste. This regulation is also outside the occupied field of the AEA.

With respect to conflict (implied) preemption, the CPA's "incidental regulation" of AEA radionuclides is squarely within RCRA's waiver. The exercise of RCRA authority can, and in fact already *does*, have a permissible incidental

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effect on DOE's management of AEA radionuclides. As a result, the CPA's regulation is not *per se* unconstitutional.

With respect to sovereign immunity, Congress has "clearly and unambiguously" authorized state regulation of all solid and hazardous wastes at federal facilities under RCRA. With the exception of Subsection 5(1), the operative provisions of the CPA only apply to material that is "solid waste" within the waiver of sovereign immunity under RCRA. Furthermore, the CPA does not discriminate against Hanford as a federal facility. Rather, the CPA operates uniquely upon Hanford because Hanford *itself* is unique in the scale of its environmental and waste management problems.

Because the scope of current regulation is integral to both the preemption and sovereign immunity analysis, it is described first below. The Plaintiffs' preemption and sovereign immunity claims will then be addressed in turn.

A. Scope of Current Regulation

1. RCRA and the HWMA provide for the comprehensive regulation of hazardous waste management facilities

RCRA provides for the "cradle to grave" regulation of hazardous waste, including the cleanup of releases to the environment at facilities that treat, store, or dispose of hazardous waste. *See* 42 U.S.C. §§ 6901-6992(k). Independent of the CPA, Washington administers a RCRA-authorized state hazardous waste program through the HWMA and its implementing Dangerous Waste Regulations. *See* Chapter 70.105 RCW; Chapter 173-303 WAC. As a result of (and to the extent of)

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being part of a RCRA-authorized state program, the HWMA and Dangerous Waste Regulations stand in lieu of RCRA as the law governing hazardous waste management in Washington. *See* 42 U.S.C. § 6926(b); 40 C.F.R. § 271.3(b).

Of particular note, RCRA and the HWMA require facilities such as Hanford that treat, store, or dispose of hazardous waste (known as "TSDs") to obtain permits.[5] 42 U.S.C. § 6925(a); WAC 173-303-800(2). A facility's permit must implement prescriptive standards for TSD operation as defined by the Dangerous Waste Regulations and Subchapter III of RCRA.[6] These include engineering and operational standards for waste management units such as container storage areas, tank systems, surface impoundments, waste piles, landfills, and incinerators.[7] They also include operational standards for such matters as waste analysis, facility security, facility inspections, personnel training, and contingency planning.[8]

In addition, each final permit must include facility-specific terms and conditions that are determined to be "necessary to protect human health and the

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[5] When RCRA was amended in 1980, existing TSD facilities were grandfathered into a streamlined initial permitting process known as "interim status" permitting. *See* WAC 173-303-803(2), (3); WAC 173-303-805(1). Such facilities became subject to operating standards supplied by interim status regulations. *See* WAC 173-303-803; WAC 173-303-400; *see also*, 40 C.F.R. Part 265. Eventually, these facilities—and all new TSD facilities—must apply for and receive "final status" permits which include facility-specific permit conditions. WAC 173-303-803(2), (4); WAC 173-303-806(1), (2). Hanford possesses a final facility permit, but not all of its units are covered by the permit.

[6] 40 C.F.R. § 270.32(b)(1); WAC 173-303-815(2)(b)(i); WAC 173-303-600.

[7] 40 C.F.R. Part 264, Subparts I-O; WAC 173-303-630 to -670.

[8] 40 C.F.R. Part 264, Subparts B-D; WAC 173-303-300 to -350; WAC 173-303-620.

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environment."[9] This "omnibus authority" gives Ecology the directive and authority to create conditions to address specific or unique circumstances at a facility. Omnibus authority includes the authority to condition waste acceptance at a TSD upon maintaining (or achieving) regulatory compliance and cleaning up releases to the environment.

In direct line with this concept, wastes from cleanups under the Comprehensive Environmental Response and Cleanup Liability Act (CERCLA) cannot be sent to non-compliant TSD facilities. *See* 42 U.S.C. § 9621(d)(3). If the TSD is a land disposal facility (such as Hanford), this prohibition is also keyed on any disposal unit at the facility that currently has an uncontrolled release. 42 U.S.C. § 9621(d)(3)(B). This provision, and implementing regulations that capture it as the "Off-Site Rule," *see* 40 C.F.R. § 300.440, help ensure that wastes from Superfund sites do not contribute to present or future environmental problems at non-compliant TSDs.

In addition to regulating active operations, final facility permits must address two matters related to environmental contamination at the TSD. First, the permits must include specific standards for "closure" of the TSD (or individual waste management units at the TSD) at the end of its active life.[10] These standards must address the acceptable level of hazardous waste or hazardous constituents that may be left behind in the facility's soils and groundwater. WAC 173-303-610(2)(b)(i).

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[9] 40 C.F.R. § 270.32(b)(2); WAC 173-303-815(2)(b)(ii).

[10] 40 C.F.R. § 264.111; WAC 173-303-610(2).

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Second, the permits must specify "corrective action" (cleanup conditions) for any releases of hazardous waste or hazardous constituents that occur during the facility's life.[11] Under Washington's corrective action regulation, a hazardous constituent (known as a "dangerous constituent") is coextensive with a "hazardous substance" under Washington's Model Toxics Control Act (MTCA).[12]

Finally, with the authority to issue permits comes the authority to modify or terminate a permit for cause. Final facility permits may be unilaterally modified or terminated for, among other things, permit noncompliance or a determination that a permitted activity endangers public health or the environment.[13] As described on page 45 below, Washington has terminated one facility permit for compliance-related reasons in the past five years. Within the past 15 years, EPA has revoked the permit status and required closure of another Washington TSD unit receiving off-site waste.

2. RCRA and HWMA authority applies equally to facilities that manage mixed waste

All of the above requirements and authorities apply with equal force if a TSD manages waste that contains radionuclides, including AEA radionuclides. Although the term "solid waste" under RCRA excludes AEA source, special

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[11] WAC 173-303-645(11); WAC 173-303-64610; WAC 173-303-64620.

[12] 42 U.S.C. § 6924(u), (v); WAC 173-303-64610(4). Corrective action under the HWMA is accomplished through substantive compliance with the cleanup requirements of MTCA's implementing regulations, Chapter 173-340 WAC. WAC 173-303-64620(4). MTCA is a state analog to CERCLA.

[13] 40 C.F.R. § 270.41; 40 C.F.R. § 270.43; WAC 173-303-830(3)(b)(i); WAC 173-303-830(5).

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nuclear, or byproduct material, *see* 42 U.S.C. § 6903(27), when a non-radioactive hazardous waste has become mixed with radioactive material—including AEA material—the resulting "mixed waste" *is* subject to RCRA by virtue of RCRA's application to the "RCRA portion" of the waste. 51 Fed. Reg. 24504 (1986). In fact, the EPA only authorizes a state to administer a hazardous waste program in lieu of RCRA if the state has the authority to regulate mixed waste.[14] *Id.*

Because of the commingled nature of mixed waste, regulation of the RCRA portion of mixed waste necessarily has an incidental effect on management of the AEA portion of the waste. Regulations concerning the closure of tanks, for instance, require that certain performance standards be met for waste removal and decontamination.[15] To the extent these performance standards require removal of the RCRA portion of the waste, AEA material will unavoidably be removed as well.

In another example, any "land disposal restricted" hazardous waste must first be treated through specific means and to specific standards before disposal. RCRA's implementing regulations specify that for the waste category of "[r]adioactive high level wastes generated during the reprocessing of fuel rods," vitrification is the required land disposal restriction treatment standard. 40 C.F.R. § 268.40 (table "Treatment Standards for Hazardous Wastes"). Implementing the

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[14] Washington was one of the first states to receive authorization to regulate mixed waste. 53 Fed. Reg. 37045 (1988); *see* RCW 70.105.109.

[15] *See* 40 C.F.R. § 264.111; 40 C.F.R. § 264.197; WAC 173-303-610(2); WAC 173-303-640(8).

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applicable RCRA treatment standard thus has an unavoidable incidental impact on management of the AEA portion of the waste.

If treated waste remains "mixed" after treatment (i.e., if the AEA radionuclides have not been separated from the waste), the resulting waste may only be disposed at a RCRA-compliant landfill. Once again, there is an unavoidable incidental effect on management of the AEA portion of the waste through RCRA's regulation of the hazardous waste component.

3. Congress expressly established incidental regulation of AEA radionuclides through the Federal Facility Compliance Act

Congress has ratified this incidental, but substantial, regulation. In 1992, Congress enacted the Federal Facility Compliance Act (FFCA), which is codified in RCRA. *See* Pub. L. No. 102-386, Title I, § 102(a), (b), 106 Stat. 1505, 1506 (1992). Among other things, the FFCA clarifies that the federal government's waiver of sovereign immunity under RCRA fully applies to federal facilities. With specific respect to DOE and mixed waste, Congress partially delayed this waiver for penalties that could be imposed for violating a RCRA length-of-storage prohibition. Pub. L. No. 102-386, § 102(c)(3)(B); *see* historical note following 42 U.S.C. § 6961. In order to avoid penalties, Congress required DOE to develop state-enforceable plans and schedules for developing "treatment capacities and technologies" to address the backlog of mixed waste stored in violation of this prohibition. *See* 42 U.S.C. § 6939c(b)(1)(A)(i); 42 U.S.C. § 6939c(b)(2)(C).

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The significance of this is that state regulation of the storage and treatment of mixed waste—including requirements to drive the development of new treatment technologies required because the waste is radioactive—may have an unavoidable *and permissible* incidental impact on DOE's "exclusive" management of the radiation hazards of such waste. In addition, where the radioactive component of mixed waste has frustrated the proper management of hazardous waste (as is often the case with mixed waste), Congress has given the states express permission to drive the federal government toward developing a treatment technology that addresses radionuclides in order to avoid continued mismanagement of the hazardous component of the waste.

Set against this regulatory background, the Plaintiffs' preemption and sovereign immunity arguments are addressed in turn.

B. The Cleanup Priority Act is Not Preempted Because it Regulates Outside the Preempted Field of the AEA and Does Not Facially Conflict with Federal Law

A state law may be preempted by federal law in one of two ways. First, Congress may preempt state authority in express terms or through a "scheme of federal regulation so pervasive" as to create the inference that Congress has occupied a "field" that "preclude[s] enforcement of state laws on the same subject." *Pacific Gas & Electric Co. v. State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190, 203 (1983) (internal citations and quotations omitted). Second, where Congress has not entirely displaced state regulation in a specific area, state law may still be impliedly preempted "to the extent it actually conflicts with federal

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law." *Id*. Such a conflict arises "when compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]" *Id.* (internal citations and quotations omitted). Plaintiffs argue preemption under both theories.

The Court must find a "clear and manifest" legislative intent for preemption. *In re Cybernetic Services, Inc.*, 252 F.3d 1039, 1046 (9th Cir. 2001), *cert. denied Moldo v. Matsco, Inc.*, 534 U.S. 1130 (2002). State law is presumed valid, *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960), and there is a strong presumption against finding that state law is preempted. *Comm. of Dental Amalgam Mfrs. & Distrib. v. Stratton*, 92 F.3d 807, 811 (9th Cir. 1996).

1. The Cleanup Priority Act does not regulate within the "occupied field" of the AEA

a. The "field" occupied by the AEA does not extend to the cleanup of radionuclides that have escaped to the environment

The Plaintiffs' primary preemption argument is that the AEA occupies the "entire field of nuclear safety concerns" and that the CPA intrudes on this field. *See, e.g.*, U.S. Br. at 37. Defining the "occupied field" of the AEA is thus critical to evaluating whether any portion of the CPA is within a preempted field.

The Plaintiffs base their argument for "field preemption" on one sentence in *Pacific Gas*: "[t]he federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." *Pacific*

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Gas, 461 U.S. at 212. However, Justice Blackmun's concurring opinion in *Pacific Gas* notes that this sentence is inconsistent with the rest of the majority opinion: "Congress has occupied not the broad field of 'nuclear safety concerns,' but only the narrower area of how a nuclear plant should be constructed and operated *to protect against radiation hazards*." *Id*. at 224 (emphasis added). He also notes "[t]he Court recognizes the limited nature of the federal role, *ante* at 1722, but then describes that role in more expansive terms, *ante*, at 1726-1727." *Id*. at n.1.

Seven years after *Pacific Gas*, Justice Blackmun penned a unanimous Supreme Court opinion confirming that the radiological safety "field" preempted by the AEA is indeed narrower than "all nuclear safety concerns." In rejecting a broad reading of *Pacific Gas'* holding, the Court in *English v. General Elec. Co.*, 496 U.S. 72 (1990), held:

> [N]ot every state law that in some remote way may affect the nuclear safety decisions made by those who build and run nuclear facilities can be said to fall within the pre-empted field. . . . Instead, for a state law to fall within the pre-empted zone, it must have some direct and substantial effect on the decisions made by those who *build or operate nuclear facilities concerning radiological safety levels.*

English, 496 U.S. at 85 (emphasis added).

Read together, *Pacific Gas* and *English* literally hold that the focus of the AEA, and therefore the "field" of preemption, is on radiation hazards associated with the construction and operation of nuclear power plants. However, both of these cases arose in the context of a state law affecting nuclear power plants in some manner. To the State's knowledge, no court has directly addressed whether

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the AEA preempts a statute such as the CPA, which directly regulates AEA radionuclides only in the context of cleaning up uncontrolled environmental releases.

Nothing in the AEA addresses the cleanup of released radionuclides. *See generally*, 42 U.S.C. §§ 2014-2114. Nothing in the extensive legislative history of the AEA suggests that Congress even considered cleanup concerns.[16] Indeed, it would be another 25 years before Congress passed CERCLA as a comprehensive environmental cleanup law.

This lack of legislative history is significant. In finding that state tort remedies were not preempted by the AEA, the Court in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) noted: "[i]ndeed, there is no indication that Congress even seriously considered precluding the use of such remedies either when it enacted the Atomic Energy Act in 1954 and or when it amended it in 1959." *Silkwood,* 464 U.S. at 251.

As noted by the United States, Congress focused on three concerns in enacting the AEA: (1) national security concerns; (2) the belief that the federal government is in the best position to determine safety standards in the complex area of managing source, special nuclear, and byproduct material; and (3) the need for uniform national standards to ensure that states will not be overprotective in the area of health and safety (which could impair the development and use of atomic

[16] Counsel for the State make this representation after examining the legislative history of the AEA.

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energy). *See* U.S. Br. at 44. The cleanup of radionuclides that have escaped to the environment has nothing to do with these concerns. First, cleanup statutes do not grant a state "control" over critical nuclear materials because radionuclides that have dispersed to the environment are not a matter of national security. Second, as evidenced by successful state laws such as MTCA and every RCRA-authorized "corrective action" program, environmental cleanup is not the exclusive province of federal expertise. Third, having radionuclide cleanup levels that may differ from state to state is no different than having differing cleanup levels for other released hazardous substances.[17] No overriding national interest is implicated; indeed, such matters are firmly and historically rooted in the police power of the states. If, ultimately, one state ends up "cleaner" than another, no national purpose is frustrated.

Indeed, the United States does not apply the "exclusive authority" of the AEA to the cleanup of released radionuclides at Hanford. Instead, it relies on the authority of CERCLA. In enacting CERCLA, Congress specifically addressed releases of AEA radionuclides. It precluded CERCLA remedial and emergency response authority from applying under certain narrow circumstances, but by implication, created cleanup authority over AEA radionuclides in all other

[17] Cleanup levels under MTCA, for instance, may—depending upon the application—be more stringent (protective) than those developed under CERCLA. MTCA defines uniform risk goals in setting cleanup levels, while CERCLA defines risks goals within a range, but on a site-by-site basis. Goswami Aff. ¶ L.

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circumstances. S*ee* 42 U.S.C. § 9601(22)(C).[18] CERCLA also waived sovereign immunity with respect to state laws concerning removal and remedial actions. 42 U.S.C. § 9620(a)(4).[19] CERCLA's role as the federal framework for addressing the cleanup of released radionuclides proves that the field occupied by the AEA does not include cleanup.

The Plaintiffs ignore the refinement of the AEA's "field" in case law and ignore the role of CERCLA.[20] The preempted field of the AEA does not include the cleanup of AEA radionuclides that have escaped to the environment.

b. The Cleanup Priority Act's regulation is outside the occupied field

In arguing for broad field preemption under the AEA, the Plaintiffs lump all the provisions of the CPA together. Three sections of the CPA operate or have an

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[18] *See also* 42 U.S.C. § 9601(10) (which includes radionuclide releases permitted under the AEA within "federally permitted releases" that do not trigger CERCLA liability).

[19] This waiver does not extend to any portions of federal facilities listed on CERCLA's National Priority List. CERCLA's waiver in relation to the CPA is discussed on pages 42-43, *infra*.

[20] Furthermore, no case cited by the Plaintiffs in support of field preemption is on point with the CPA, which is a law that indirectly regulates radionuclides through the exercise of solid and hazardous waste authority and only directly regulates radionuclides when they are released to the environment. *See Nevada v. Watkins*, 914 F.2d 1545 (9th Cir. 1990) (statute declared it illegal to store high-level waste in Nevada); *Washington State Bldg. & Const. Trades Coun., AFL-CIO v. Spellman*, 684 F.2d 627, 629 (9th Cir. 1982) (statute prohibited "the transportation and storage within Washington of radioactive waste produced outside the state"); *United States v. Kentucky*, 252 F.3d 816, 820 (6th Cir. 2001) (Kentucky attempted to directly prohibit disposal of AEA materials); *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1228 (10th Cir. 2004) (series of Utah statutes preempted based on conflict preemption); *Abraham v. Hodges*, 255 F. Supp. 2d 539 (D.S.C. 2002) (Governor's executive order barred the shipment of plutonium by the United States into South Carolina).

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effect on AEA radionuclides: Sections 4, 5, and 6. None of these sections operate within the AEA's preempted field.

Subsection 5(1) of the CPA requires Ecology to "consider releases . . . of radioactive substances or radionuclides as hazardous substances" and to "require corrective action for, or remediation of, such releases" to the risk standards established under MTCA. RCW 70.105E.050(1). In other words, Subsection 5(1) requires Ecology to compel the cleanup of radionuclides, including AEA radionuclides, under state law authority. As noted above, the occupied field of the AEA does not include the cleanup of radionuclides that have escaped to the environment. Therefore, Subsection 5(1) is outside the field occupied by the AEA**.**

Subsection 5(2) requires Ecology to include "all known or suspected carcinogens, including radionuclides and radioactive substances" in calculating the "applicable clean-up standard, corrective action level, or maximum allowable projected release from a landfill" under its RCRA authority. RCW 70.105E.050(2). It further requires that in making any permit decision under its RCRA authority, or reviewing any environmental document relating to a mixed waste facility or site, Ecology is to ensure that the "cumulative risk from all . . . carcinogens" does not exceed a certain level of protectiveness.

Subsection 5(2) does not command Ecology to directly regulate radionuclides, nor does it mandate how Ecology is to "include" or "consider" information related to radionuclides in its actions. Instead, it directs Ecology to consider the cumulative risk posed by radionuclides in combination with other

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released material over which it has authority.[21] Until it is put to the test and actually applied to a concrete set of facts, it is impossible to conclude that Section 5 operates within the AEA's occupied field. *See, e.g., Pacific Gas*, 461 U.S. at 203 (concluding a statute requiring a state agency to make a future determination is unripe for facial review).

As explained on pages 11-14, Sections 4 and 6 of the CPA apply only to the solid or hazardous waste in "mixed waste." By regulating solid and hazardous waste, as opposed to radionuclides, the CPA does not operate within the occupied field. Instead, it only *incidentally* regulates AEA radionuclides in the course of regulating solid and hazardous waste. As shown below with respect to conflict preemption, this incidental regulation is permissible and does not render the CPA facially unconstitutional.

The Plaintiffs nevertheless argue that even if it operates on solid or hazardous waste, the motive of the CPA is to regulate within a preempted field. U.S. Br. at 39-40; 42-43. The Plaintiffs cite no authority for the proposition that motive is relevant to a preemption analysis. To the contrary, case law discounts any significance of motive in analyzing preemption. *See, e.g., English*, 496 U.S. at 84 (Court found impact of law, rather than intent, to be the proper focus of inquiry); *Kerr-McGee v. City of West Chicago*, 914 F.2d 820, 827 (7th Cir. 1990) (court

[21] In conducting a risk assessment, it is impossible to consider risks posed by radioactive contamination separate from risks posed by non-radioactive contamination. To accurately assess the danger, it is necessary to consider the accumulation of all risk factors. Goswami Aff. ¶¶ H-J.

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refused to speculate as to bias or motive that may cause city to apply building codes in preempted manner); *see also RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1146 (9th Cir. 2004) ("It is well settled that a reviewing court 'will not strike down an otherwise constitutional statute on the basis of an allegedly illicit legislative motive'"). The Court should ignore the Plaintiffs' arguments regarding the alleged motive of the CPA's drafters.[22]

2. The Cleanup Priority Act does not conflict with federal law

Assuming there is no "field preemption," a state law may also be impliedly preempted to the extent it conflicts with federal law. *Pacific Gas,* 461 U.S. at 203. Such a conflict arises "when compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]" *Id.* (internal citations and quotations omitted). In considering whether implied preemption exists, conflicts between state and federal regulation are not to be sought where none clearly exist. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960).

The Plaintiffs appear to concede that the CPA does not directly conflict with federal law, or make it impossible to comply with federal law. Instead, they argue the CPA so interferes with the "exclusive" federal regulation of AEA radionuclides

[22] The CPA also directly contradicts the Plaintiffs' arguments concerning motive by authorizing Ecology to regulate mixed waste only to the "extent it is not preempted by federal law." RCW 70.105E.040(1).

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as to be facially invalid. However, it is impossible to conclude that the operative sections of the CPA will conflict with the AEA in every, or even *any*, application.

a. Cleanup Priority Act Section 5 does not conflict with federal law

For the same reasons that the cleanup of radionuclides is outside the AEA's preempted field, the cleanup standard requirements of the CPA's Subsection 5(1) do not frustrate or interfere with Congressional concerns in enacting the CPA. Subsection 5(1) ensures that the same cleanup standards that apply to every other hazardous substance released to the environment also apply to radionuclides. Unless and until Ecology applies Subsection 5(1) in a way that hinders the full accomplishment and execution of the AEA, the Plaintiffs' claim is unripe.

Plaintiffs' claim against Subsection 5(2) is also unripe since Subsection 5(2) does not mandate how Ecology is to "include" or "consider" information related to radionuclides in its permitting actions and other lawful duties. As a result, it is impossible to conclude as a facial matter that Subsection 5(1) conflicts with the AEA. *See, e.g., Pacific Gas,* 461 U.S. at 203 (statute requiring state agency to make a future determination is unripe for facial review).

b. Cleanup Priority Act Sections 4 and 6 only incidentally regulate AEA materials

Beyond Section 5, this case presents the issue of whether the CPA's application of RCRA-authorized state law to a permitted hazardous waste management facility so conflicts with the AEA as to be facially preempted because of its incidental impacts.

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The Supreme Court has considered "incidental regulation" in the context of AEA preemption in three cases. In *English,* the Court refused to find preemption of state tort law following the filing of a "whistleblower" safety complaint at a nuclear facility. Instead, the Court held that the law's impact on radiological safety decisions would be mere "incidental regulatory pressure," and therefore not preempted. *English,* 496 U.S. at 86.

In *Silkwood,* the Court held that a claim for millions of dollars in punitive damages in a state tort action arising out of a plutonium leak from a nuclear facility did not fall within the nuclear safety field preempted by the AEA, and did not frustrate the federal scheme of nuclear regulation. *Silkwood,* 464 U.S. at 256-57. *English* acknowledged that *Silkwood's* allowance of large damage awards arising out of radiological safety violations would affect the field of "radiological safety" decisions preempted by the AEA. *English,* 496 U.S. at 86. Even so, the Court found this interference "incidental" and therefore acceptable. *Id*.

Similarly, in *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 186 (1988), the Court found that an increased workers' compensation award assessed by Ohio against a nuclear facility is "'incidental regulatory pressure' that Congress finds acceptable." The Court reached this conclusion after rejecting sovereign immunity arguments, and rejected AEA nuclear preemption arguments in a footnote. *Id*. at n.9.

As noted *supra,* pages 21-22, because of the commingled nature of mixed waste, a state's regulation of the RCRA portion of mixed waste necessarily has an

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incidental effect on management of the AEA portion of that waste. Incidental regulation of AEA radionuclides is unavoidable in matters such as imposing hazardous waste tank closure requirements, waste treatment standards, landfill design and monitoring requirements, and the fundamental application of permitting authority with all of its implications (including permit termination). As also noted *supra*, Congress confirmed this incidental regulation through the Federal Facility Compliance Act amendments to RCRA. Congress made it clear that RCRA's length of storage prohibition fully applies to mixed waste and required DOE plans and schedules to address the backlog of mixed waste stored in violation of this prohibition. States enforce such plans through their authority over the RCRA component of mixed waste. This enforcement, however, indirectly *and substantially* regulates the radioactive portion of the waste.

The Tenth Circuit recognized this reality in *United States v. State of New Mexico*, 32 F.3d 494 (10th Cir. 1994). *New Mexico* concerned a waste disposal facility owned by DOE and permitted by the state. DOE disposed of both a state-regulated waste (hazardous) and a federally-regulated waste (radioactive) in the facility. *New Mexico,* 32 F.3d at 496. New Mexico developed permit conditions pertaining to the disposal of the radioactive materials, specifically limiting it to *de minimis* amounts to ensure that DOE disposed of only the type of waste for which the facility had been permitted. *Id*. The United States appealed the permit, arguing a violation of the Supremacy Clause. *Id*. The Tenth Circuit found

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that the actions of the state did not amount to the direct regulation of AEA materials:

> [I]t does not appear that the state is attempting to substantively regulate radioactive waste through this condition. The ten percent standard can be seen as a cut-off point beyond which it may be reasonably assumed that there is more than a de minimis level of radioactive material in the hazardous waste burn. In this way, *condition V.F.9 is merely another tool for New Mexico to implement its statutory and regulatory hazardous waste provisions*.
>
> . . . Further, the language requiring measurement from time-to-time emphasizes *New Mexico's position that it is not engaging in the substantive regulation of radionuclides, but simply attempting to ensure compliance with New Mexico's statutory requirements*.

New Mexico, 32 F.3d at 498-499 (emphasis added).[23]

As interpreted by Ecology, even with the CPA's broad definition of "mixed waste," Sections 4 and 6 of the CPA act through, and are thus limited by, the existing permitting authority in the HWMA.[24] *See* pp. 11-14, *supra*. As such, they regulate mixed waste only at permitted hazardous waste management facilities, and only to the extent mixed waste contains a hazardous waste component.

Because the mixed waste moratorium in Section 4 is "filtered" through the HWMA, many of the impacts trumpeted by the Plaintiffs simply do not exist. For

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[23] *New Mexico* was decided on sovereign immunity and not preemption grounds. However, the court's holding that New Mexico was not regulating AEA materials through exercising its hazardous waste authority applies with equal force to preemption.

[24] There is a caveat to this statement. Since Subsection 6(1) applies more broadly to "sites" rather than "facilities," it is possible that Subsection 6(1) could capture a mixed waste "site" that is not an HWMA facility under Section 4 or the rest of Section 6.

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instance, the United States claims the Navy will no longer be able to ship "classified components" to Hanford for disposal. U.S. Br. at 46. However, if these components do not otherwise constitute dangerous waste under the HWMA (which it appears they do not, *see* Peters Decl. ¶ 7), the CPA will not impact their disposal. Even if some of the components are within the scope of the HWMA, RCRA allows the President to exempt certain waste from state regulation based upon a determination that it is "in the paramount interest of the United States to do so." 42 U.S.C. § 6961(a). Mills Aff. ¶ H.

Similarly, the United States claims that the Puget Sound Naval Shipyard will no longer be able to dispose of other "mixed wastes" at the US Ecology commercial low-level radioactive waste repository. U.S. Br. at 47. US Ecology, however, does not accept HWMA dangerous waste for disposal. It is therefore not a "facility" under either the HWMA or the CPA and is completely outside of Section 4. Goldstein Aff ¶ J. As a result, even if the Navy's waste stream to US Ecology is "mixed waste" under the CPA's broad definition, it is not affected by the CPA.[25]

The United States and TRIDEC claim that the CPA will impair national security research at Pacific Northwest National Lab (PNNL) and impair PNNL's ability to maintain the nation's tritium stockpile. U.S. Br. at 47-49; TRIDEC Br. at

[25] In addition, to the extent the Naval waste is generated in Washington or Hawaii, it is waste generated within the "Northwest Compact" for purposes of commercial low-level waste disposal and is therefore exempt from the CPA. Goldstein Aff. ¶ K; RCW 70.105E.080(3).

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17, 20. Again, unless the materials constitute discarded dangerous waste under the HWMA, PNNL may continue to import them. Skinnarland Aff. ¶ N.

Unquestionably, Subsection 4(2) and other sections of the CPA will have an incidental effect on the United States' management of AEA radionuclides. All of these provisions, however, are triggered by RCRA-authorized authority that is firmly within the State's province. Much of the Plaintiffs' briefing forgets this critical fact. TRIDEC, for instance, suggests that the requirements of the CPA "pierce the heart of Hanford's operations." *See* TRIDEC Br. at 14, 20. If this is true, then the HWMA and RCRA also pierce the heart of Hanford's operations, because it is HWMA and RCRA requirements that drive matters such as tank closure, tank waste treatment, the retrieval of waste from "retrievable storage," and corrective action. TRIDEC implicitly recognizes this when, as evidence of the CPA's supposed invalid "regulation," it suggests that the CPA conflicts with the TPA. The TPA provisions it highlights, however, relate to milestones for gaining compliance with *state law requirements* for tank waste treatment and tank closure. *See* TRIDEC Br. at 16-17.

The use of hazardous waste authority is not a pretext for regulating AEA radionuclides at Hanford. If one ignores the radioactive component, Hanford is still storing 53 million gallons of hazardous waste in violation of a hazardous waste storage prohibition in tanks that are not safe for holding the waste (and in some cases have already leaked). Cusack Aff. ¶ G. Hanford has either disposed of or is "retrievably storing" enough suspect hazardous waste in unlined trenches to fill

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2,200,000 55-gallon drums. Cusack Aff. ¶ I. Hanford has groundwater plumes of released hazardous waste constituents in excess of drinking water standards that cover some 80 square miles. Goswami Aff. ¶ D. Given these facts, the State is not using its hazardous waste authority as a pretext at Hanford. Instead, it is the Plaintiffs who attempt to use the presence of AEA radionuclides as a pretext for frustrating the State's lawful and appropriate exercise of hazardous waste authority.

In the end, many of the Plaintiffs' arguments boil down to the complaint that the CPA may make it more expensive to clean up Hanford and other sites. However, the Plaintiffs have cited no authority for the idea that increased expense is enough to cause a state law to be preempted for "frustrating" a national plan. To the contrary, *English*, *Silkwood*, and *Goodyear Atomic* all indicate that an increase in cost that is "incidental" is not enough to justify preemption.

Given the degree to which RCRA already incidentally regulates AEA radionuclides, it is impossible to conclude there is no set of circumstances under which the CPA's incidental regulation of radionuclides is valid. If there is a particular application of the CPA that so frustrates the federal scheme as to be preempted, it must be considered with a concrete factual record in an as applied challenge. Summary judgment based on facial conflict preemption should be denied.

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C. The Cleanup Priority Act Regulates Within RCRA's Waiver of Sovereign Immunity

The Plaintiffs make three arguments in their second Supremacy Clause challenge.[26] First, they argue that to the extent the CPA affects the management of AEA radionuclides at federal facilities, it regulates beyond the scope of "solid waste" under RCRA and exceeds RCRA's waiver of sovereign immunity. Second, they argue that to the extent the definition of "mixed waste" under the CPA includes material that is not RCRA solid waste, it likewise exceeds RCRA's waiver of sovereign immunity. Finally, they argue that in conflict with RCRA's waiver of sovereign immunity, the CPA singles out a federal facility (Hanford) for heightened regulation as compared to other, similarly-situated facilities. *See* U.S. Br. at 50-57.

As shown below, RCRA contains a broad waiver of sovereign immunity that consents to state regulation of federal operations on the same terms as applied to anyone else. In all but one instance, the CPA only operates on material that constitutes "solid waste" under RCRA and thus does not exceed RCRA's waiver. Finally, the CPA does not discriminate in violation of RCRA's waiver of sovereign immunity. If the CPA disproportionately affects Hanford, it is because the circumstances at Hanford are unlike those at any other hazardous waste management facility in Washington. Summary judgment on the claim the CPA exceeds RCRA's waiver of sovereign immunity should be denied.

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[26] The United States separately challenges Sections 7 and 9 of the CPA as also exceeding RCRA's waiver of sovereign immunity. The State's response to these arguments is set forth on pages 57-65 below.

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1. RCRA contains a broad waiver of sovereign immunity

The RCRA waiver provides, in part:

> Each department, agency, and instrumentality of the . . . Federal Government (1) having jurisdiction over any *solid waste management facility or disposal site,* or (2) *engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste* shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural . . . *respecting control and abatement of solid waste or hazardous waste and management in the same manner, and to the same extent, as any person is subject to such requirements*. . . . The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement. . . .

42 U.S.C. § 6961(a) (emphasis added).[27] RCRA's waiver extends to all material that is "solid waste" under RCRA. RCRA defines solid waste to include:

> [A]ny garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility *and other discarded material,* including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community, *but does not include* solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33, or *source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended*.

[27] "Solid waste" for the purposes of RCRA's waiver is defined by this statutory definition and not by RCRA's implementing regulations (which have myriad exclusions). *See, e.g., Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1314-1315 (1993) ("solid waste" for purposes of RCRA citizen suit is determined by broader statutory definition, not narrower regulatory definition).

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42 U.S.C. § 6903(27) (emphasis added). Despite the CPA's broad definition of mixed waste, the CPA only regulates material that is solid waste under RCRA, with the exception of Subsection 5(1).

2. No Section of the Cleanup Priority Act exceeds RCRA's waiver of sovereign immunity, except Subsection 5(1)

As explained on pages 11-13, Section 4 of the CPA acts through, and is limited by, the existing permitting authority in the HWMA. As such, it acts only on RCRA regulated waste through existing RCRA authority. It is therefore within RCRA's waiver of sovereign immunity.

Subsection 5(2) of the CPA requires Ecology to consider the cumulative impact of radionuclides in undertaking certain actions under the HWMA. AEA radionuclides are not solid waste under RCRA. 42 U.S.C. § 6903(27).[28] Subsection 5(2), however, does not command Ecology to directly regulate such radionuclides, nor does it direct how Ecology is to "include" or "consider" information related to the radionuclides in its management of RCRA solid waste. Just as with the Plaintiffs' preemption challenge, it is impossible to conclude as a facial matter that every application of Subsection 5(2) exceeds the RCRA waiver.

Section 6, again, only acts on material that is discarded and is thus solid waste. Subsections 6(1) and 6(2) act on landfills or burial trenches into which

[28] Radionuclides that do not constitute source, special nuclear, or byproduct material are not regulated by the AEA and are not excepted from RCRA's definition of "solid waste." *See* 42 U.S.C. § 6903(27). Under RCRA, any material released to the environment in a cleanup or landfill release scenario would be "discarded material" and thus solid waste.

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"mixed wastes are reasonably believed . . . *to have been disposed*," with a requirement that Ecology order the cessation of further "disposal" into such trenches. Disposal is one method by which material becomes "discarded" solid waste. *See, e.g., Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1314 (1993) (scope of "discarded material" under RCRA includes, but extends beyond, material that is affirmatively "disposed"). Therefore, Subsections 6(1) and 6(2) only capture mixed waste that is solid waste.

Subsection 6(3) provides closure requirements for mixed waste tanks. Just like Section 4, Subsection 6(3) operates through the permitting authority of the HWMA. *See* RCW 70.105E.060(3). As a result, Subsection 6(3) only operates on solid waste.

In contrast to the other sections, Subsection 5(1) of the CPA exceeds RCRA's waiver of sovereign immunity to the extent it regulates the cleanup of radionuclides that are source, special nuclear, or byproduct material. This fact, however, does not render the CPA facially invalid. First, there are other constitutionally valid applications of Subsection 5(1) (e.g., to non-federal facilities and to cleanup of non-AEA radionuclides). Second, although Subsection 5(1) may exceed the waiver of sovereign immunity under RCRA, it is not inconsistent with the waiver of sovereign immunity under CERCLA.

CERCLA's waiver of sovereign immunity provides, in part:

> State laws concerning removal and remedial action, including State laws regarding enforcement, *shall apply to removal and remedial action at facilities owned or operated by a department, agency, or*

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> *instrumentality of the United States . . . when such facilities are not included on the National Priorities List.*

42 U.S.C. § 9620(a)(4) (emphasis added). Under this waiver, state laws such as MTCA apply to cleanup sites at federal facilities so long as those sites are not named on CERCLA's National Priority List.

Three sub-areas within Hanford are currently on the National Priorities List: the 100 Area, 200 Area, and 300 Area. Goswami Aff. ¶ F. So long as these portions of Hanford are on the National Priorities List, neither MTCA nor Subsection 5(1) of the CPA directly applies to the areas. Once the areas are deleted from the list, however, MTCA and Subsection 5(1) will apply in full. And, in the interim before this occurs, the cleanup standards provided by MTCA and Subsection 5(1) will be "relevant and appropriate requirements" that must be addressed in CERCLA remedy decisions. *See* 42 U.S.C. § 9613(d)(2)(a)(ii).[29] So long as the State does not attempt to directly apply Subsection 5(1) to listed portions of Hanford, there is no constitutional conflict.[30]

3. The Cleanup Priority Act does not discriminate against Hanford as a federal facility

RCRA's waiver provides that a state law may regulate federal activities "in the same manner and to the same extent" as other activities. The United States complains that the CPA regulates Hanford "differently, and to a greater extent, than

[29] Even though they are not directly applicable, MTCA cleanup levels for non-radioactive hazardous substances are considered as "relevant and appropriate requirements" at Hanford today. *See* Goswami Aff. ¶ L.

[30] MTCA, for instance, has been in effect since 1989 without a constitutional conflict having arisen with CERCLA's waiver of sovereign immunity.

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other similarly-situated facilities." U.S. Br. at 56. The CPA's effect on Hanford, however, is proportionate to Hanford's regulatory and environmental challenges as a hazardous waste management facility.

Hanford's compliance challenges are well recited in this brief. *See* pp. 4-8, *supra*. Given these challenges, there *are* no other Washington TSDs that are "similarly-situated" to Hanford. No other commercial TSD[31] holds *any* hazardous waste in tanks that do not comply with RCRA, let alone holds 30 million gallons of such waste in structurally unsound underground tanks. No other commercial TSD is know to be storing *any* hazardous waste in violation of RCRA's length-of-storage prohibition, let alone storing 53 million gallons of such waste in tanks, with the equivalent of another 75,000 drums of what is potentially such waste in non-compliant unlined soil trenches. No other commercial TSD has un-remediated releases of hazardous waste and hazardous waste constituents affecting over 170 square miles of groundwater. Significantly, no other commercial TSD in Washington operates a hazardous waste landfill. *See generally* Seiler Aff. ¶¶ F-U; Sellick Aff. ¶¶ F-M; Mills Aff. ¶ E.

Another key fact sets Hanford apart. The bulk of Hanford's hazardous waste is mixed with radionuclides. This fact has prevented treatment of Hanford's tank waste for 60 years. It will continue to prevent the waste from being treated until the Waste Treatment Plant is completed. Cusack Aff. ¶ M; Goswami Aff. ¶ G. In

[31] The term "commercial TSD" is used for convenience in this brief. It includes any private or public sector TSD that accepts waste from off-site generators.

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addition, mixed wastes released to the environment appear to pose different risks than pure hazardous waste and may hasten the spread of contamination. Goswami Aff. ¶ K. The United States proposes bringing still more mixed waste to this non-compliant, contaminated TSD and disposing of it to the ground.

It is not novel for the State (or the United States) to use RCRA permit authority to prevent a non-compliant facility from receiving off-site waste. In December 2002 Ecology terminated the interim status permit of a facility after years of permitting difficulties and compliance problems at the facility. Ecology terminated the permit in part because the remaining structures at the facility could not meet either interim or final status permit standards. Seiler Aff. ¶¶ V-DD.

Ten years earlier, EPA denied a final status permit application, terminated interim status, and required a TSD operator to close a hazardous waste treatment unit. EPA took the action after the operator failed to cure deficiencies in its permit application. EPA allowed the operator to continue storing hazardous waste at the TSD, but eliminated its ability to treat waste from off-site generators. Sellick Aff. ¶ N.

Given Hanford's compliance problems and the potential reach of Ecology's authority, it is impossible to say that the CPA's provisions are inconsistent with how RCRA authority could be exercised at *any* facility with the same problems. The CPA does not treat Hanford differently than other facilities. Instead, it insists that Hanford comes into compliance with the same standards other facilities have

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already met. If it takes 20 years to accomplish this, that is simply evidence of the extent of Hanford's problems.

Finally, the CPA does not just regulate Hanford. There are currently four other mixed waste facilities potentially subject to the Act. At least one of these facilities, Framatome, appears to be presently subject to the Act. Skinnarland Aff. ¶¶ I, N. Thus, the suggestion that Hanford is singled out for exclusive regulation is wrong, even if the CPA may have a greater impact on Hanford than other facilities.

The CPA applies to RCRA solid wastes and does not discriminate against Hanford. Summary judgment on the claim the CPA exceeds RCRA's waiver of sovereign immunity should be denied.

V. RESPONSE TO OTHER CONSTITUTIONAL ARGUMENTS

In addition to their broad preemption and sovereign immunity arguments, Plaintiffs also challenge specific sections of the CPA. Plaintiffs challenge Section 4 on Commerce Clause grounds and Sections 7 and 9 on Supremacy Clause grounds. TRIDEC alone also challenges the CPA on Contract Clause grounds. For the reasons below, these additional arguments are unpersuasive and do not constitute grounds for invalidating sections of the CPA.

A. Section 4 of the Cleanup Priority Act Does Not Violate the Commerce Clause

In any Commerce Clause challenge, the court must first determine whether the law regulates evenhandedly or is facially discriminatory against out-of-state interests. If the law is discriminatory, the law must withstand strict scrutiny.

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Conservation Force, Inc. v. Manning, 301 F.3d 985, 995 (9th Cir. 2002). "The guiding principle in determining whether a state regulation discriminates against interstate or foreign commerce is whether either the purpose or the effect of the regulation is economic protectionism." *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1012 (9th Cir. 1994).

If a statute regulates evenhandedly, the court applies the more deferential *Pike* balancing test. Under *Pike*, the court determines whether the statute effectuates a legitimate local public interest and whether its effects on interstate commerce are only incidental. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). If so, the law will be upheld unless the burden placed on interstate commerce is clearly excessive in relation to the putative local benefits. *Id.*

The limitation imposed on states by the Commerce Clause is "by no means absolute." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (upholding state law prohibiting import of out-of-state bait fish). Despite Commerce Clause restrictions, "[s]tates retain broad authority to regulate in the interests of their citizens." *Conservation Force*, 301 F.3d at 996.

Statutes aimed at protecting health and safety are particularly worthy of judicial deference. Parties challenging such statutes must overcome a strong presumption of validity: "if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981). In the realm of environmental regulation, the

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State is not required to "sit idly by and wait until potentially irreversible environmental damage has occurred . . . before it acts to avoid such consequences." *Pacific Northwest Venison Producers*, 20 F.3d at 1017, *citing to Maine v. Taylor*, 477 U.S. at 148.

1. Section 4 is not discriminatory

Plaintiffs have the burden of proving that Section 4 is discriminatory. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). To do so, the Plaintiffs must demonstrate that Section 4 is fueled by economic protectionism or provides benefits to Washingtonians that are denied to others. *See Northwest Venison Producers*, 20 F.3d at 1012 (import ban not discriminatory unless it is protectionist or grants benefits to state citizens that are denied to others).

Plaintiffs claim Section 4 discriminates because it stops waste at Washington's borders. This is untrue. Instead, Section 4 temporarily bars the addition of mixed waste to an already contaminated facility until the facility cleans up the existing contamination and obtains a final facility permit. The CPA does not focus on where waste is generated. Rather, it focuses on where waste is *received*. Ironically, Plaintiffs claim that the CPA harshly impacts in-state interests such as PNNL, Framatome, and the Navy. Although the State disagrees that most of these claimed impacts exist, the State agrees the CPA may create some impact on these entities. Skinnarland Aff. ¶ N; Mills Aff. ¶ G. This defeats Plaintiffs' claim that the statute is discriminatory. *See Sporhase v. Nebraska*, 458 U.S. 941, 955-56

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(1982) (state laws that impose restrictions on state residents do not discriminate against out-of-state interests).

Section 4's ban on receipt by contaminated facilities is not a new concept. Rather, Section 4 is modeled on CERCLA's off-site prohibition, which prohibits shipment of CERLCA wastes to non-compliant TSD facilities. *See* 42 U.S.C. § 9621(d). *See also* EPA's Off-Site Rule at 40 C.F.R. § 300.440. Similarly, Section 4 of the CPA requires contaminated facilities to come into compliance with existing law before accepting off-site waste.

Section 4 does not give the State new powers. Ecology had preexisting authority to prohibit the addition of new waste to a contaminated site and was considering using this authority at Hanford when the CPA was passed. Cusack Aff. ¶ W. The fact that the moratorium under the CPA is automatic, whereas it was previously discretionary, does not transform Section 4 into a discriminatory law. The objective of Section 4 is to protect human health and the environment. The means chosen to achieve this objective do not discriminate.

Plaintiffs also allege that the CPA is discriminatory in purpose, even if it is not discriminatory in effect. To support their claim of discriminatory purpose, Plaintiffs attach a welter of evidence to show intent, including citations contained in advertising materials, the proponents' website, and even a press release. However, in interpreting initiatives, the focus is on *voter* intent, not proponent intent. *See Pierce County v. State*, 150 Wash.2d 422, 430, 78 P.3d 640 (2003). In order to

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glean voter intent, Washington courts look first to the language of the statute.[32] Only if the statute is ambiguous will the court then turn to statements contained in the voters' pamphlet. *Amalgamated Transit Union v. State*, 142 Wash.2d 183, 205-06, 11 P.3d 762 (2000). The subjective intent of initiative proponents, as "evidenced" by advertising materials, is not relevant to the analysis. Plaintiffs have failed to establish discriminatory intent or effect.

2. Because the Cleanup Priority Act is not discriminatory, the cases cited by Plaintiffs are inapposite

Plaintiffs cite to a series of trash import cases in an attempt to bolster their arguments that Section 4 of the CPA is unconstitutional. However, the cases cited by Plaintiffs are inapposite because, in each case, the reviewing court was asked to rule on the constitutionality of facially discriminatory legislation.

In the seminal "trash" case, *Philadelphia v. New Jersey*, the Supreme Court struck down a New Jersey law that prohibited import of solid or liquid wastes that were generated out-of-state. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Although the Court recognized that New Jersey may have valid economic and environmental reasons for the ban, the Court disagreed with the state's discriminatory method for achieving its goals:

> [W]e assume New Jersey has every right to protects its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of all

[32] When interpreting state laws, federal courts must apply state rules of statutory construction. *In re First T.D. & Inv., Inc.*, 253 F.3d 520, 527 (9th Cir. 2001); *Citizens for Responsible Gov't v. Davidson*, 236 F.3d 1174, 1190 (10th Cir. 2000); *Thomas v. Reliance Ins. Co.*, 617 F.2d 122, 125 (5th Cir. 1980).

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> waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.

Id. at 626-27.

The Supreme Court applied the same reasoning in *Chemical Waste Mgmt. v. Hunt,* 504 U.S. 334 (1992). *Hunt* involved a challenge to an Alabama law that imposed a hazardous waste disposal fee on out-of-state waste and also capped the amount of hazardous waste or substances that could be disposed of during a one year period. The cap on waste was upheld,[33] but the fee provision was struck down because of its discriminatory effect. The Court noted, though, that "it remains within the State's power to monitor and regulate more closely the transportation and disposal of *all* hazardous waste within its borders." *Id.* at 345-46 (emphasis in original). *See also Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93 (1994) (invalidating facially discriminatory surcharge applied to out-of-state waste); *C&A Carbone, Inc. v. Town of Clarkston*, 511 U.S. 383 (1994) (invalidating ordinance that favored local solid waste processing center to the complete exclusion of out-of-state solid waste processors).

Other cases cited by Plaintiffs apply similar reasoning. In *Illinois v. General Electric*, the Seventh Circuit struck down a state law that prohibited import of out-of-state spent nuclear fuel for storage or disposal in Illinois. *Illinois v. General*

[33] The "cap" provision was upheld by the Alabama Supreme Court and was not a subject of the appeal to the United States Supreme Court.

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Electric Co., 683 F.2d 206 (7th Cir. 1982). The court emphasized the laws' discriminatory nature and noted that Illinois may have more validly pursued its legitimate safety concerns by banning in-state transport of all spent nuclear fuel or otherwise treating in-state and out-of-state wastes identically. *Id.* at 213-14. *See also Waste Mgmt. Holdings v. Gilmore*, 252 F.3d 316 (4th Cir. 2001) (striking down portions of facially discriminatory ban on out-of-state waste and remanding other portions of the law for trial to determine if the law meets strict scrutiny); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982) (striking down a facially discriminatory law which prohibited in-state transportation and storage of radioactive wastes generated out-of-state).[34]

Unlike all of the laws challenged in the above-cited cases, the CPA does not focus on trash disposal and does not discriminate against out-of-state wastes. It is a

[34] The cases cited by Fluor Hanford in support of its discrimination arguments are also inapposite and can easily be distinguished. All involved state schemes that regulated flow of trash, rather than state laws that regulated cleanup. *See SSDS, Inc. v. South Dakota*, 47 F.3d 263 (8th Cir. 1995) (involved challenge to flat ban on operation of new solid waste facility to accept out-of-state waste amid a long history of protectionist measures to keep the waste out); *Gov't Suppliers Consolidating Serv., Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992) (challenge to law that would likely result in cessation of interstate transportation of waste while having no impact on intrastate transportation); *BFI Medical Waste Sys., Inc. v. Whatcom County*, 756 F. Supp. 480 (W.D. Wash. 1991) (challenge to flat facial ban on import of medical wastes); *National Solid Waste Mgmt. Ass'n v. Williams*, 877 F. Supp. 1367 (D. Minn. 1995) (challenge to law that had clear effect of keeping Minnesota waste in-state thereby economically benefiting in-state interests); *NSWMA v. Charter County of Wayne*, 303 F. Supp. 2d 835 (E.D. Mich. 2004) (challenge to law that had extraterritorial impacts and was burdensome to out-of-state interests while having no impact to in-state interests); *called into question by, NSWMA v. Granholm*, 344 F. Supp. 2d 559 (E.D. Mich. 2004) (Michigan can permissibly limit types of solid waste disposed as long as limits apply evenhandedly).

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cleanup law that applies to all wastes equally, whether those wastes are generated in-state (such as wastes from Framatome or PNNL), or out-of-state (such as wastes from other facilities in the DOE complex). The focus of Section 4 is not the origin of the waste but, rather, the suitability of the facility proposed to accept the waste. Section 4 is not discriminatory and must be upheld if it satisfies *Pike*.

3. The Cleanup Priority Act satisfies *Pike* because it places only incidental burdens on commerce that are outweighed by the important public interest at stake

Under *Pike*, the first inquiry is whether the challenged law advances a legitimate local purpose and only incidentally impacts commerce. If so, it will be upheld unless the impacts are clearly excessive in relation to the putative local benefit. *Pike*, 397 U.S. at 142.

The CPA serves the legitimate state purpose of protecting the public health and safety by promoting effective and thorough cleanup of contaminated mixed waste sites. This purpose is accomplished through several means, including the ban on adding off-site waste to a non-compliant facility. Permit conditions placed on solid waste disposal are squarely within the state's police power and serve the legitimate benefit of protecting the public from the health risks posed by dangerous wastes.

In a 1995 waste permitting case, the Ninth Circuit upheld a Washington regulation that required all medical waste transporters to obtain a certificate of public convenience and necessity prior to collecting and transporting medical waste within the state. *Kleenwell Biohazard Waste & General Ecology Consultants, Inc.*

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v. Nelson, 48 F.3d 391 (9th Cir. 1995). Despite the impact to the plaintiff (which operated exclusively in interstate commerce), the Ninth Circuit rejected the plaintiff's position that the regulation violated the Commerce Clause. It also noted that the Supreme Court had thrice upheld the constitutionality of regulations requiring interstate businesses to obtain state permits. *Id.* at 396. The court also found an indisputable local benefit: "medical waste poses a significant health risk to the public if not properly processed and . . . a uniform system of regulation is necessary to protect the public from that danger." *Id.* at 399.

Section 4 of the CPA similarly protects public health. The State's interest in enacting Section 4 is similar to the United States' interest in enacting CERCLA's off-site prohibition: the health and environment of Washington's (or United States') citizens should be protected by preventing the aggravation of environmental problems at existing problem sites.

In light of this legitimate local benefit, any impact to interstate commerce is incidental. The only out-of-state impacts identified by Plaintiffs relate to DOE's ability to freely ship waste among its various sites. However, the CPA does not prevent DOE from shipping waste to Washington. If Washington continues to be a desirable location for mixed waste disposal, the United States or a private entity could construct a compliant mixed waste facility in Washington. Hanford is not a compliant facility. Any impact to DOE's ability to ship new wastes to Hanford is incidental to the CPA's goal of achieving effective cleanup of contaminated sites.

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Since Section 4 serves a legitimate state purpose and only incidentally impacts interstate commerce, Section 4 must be upheld unless its burdens to interstate commerce are *clearly excessive* in relation to the local benefit. Plaintiffs have not demonstrated clearly excessive burdens to interstate commerce. Hanford is not the only location in the entire country where mixed waste can be shipped. As indicated by Dr. Ines Triay's declarations, when DOE has needed to find alternative locations for its waste, it has managed to do so. *See* Triay Decl. at p. 6, ¶ 10 (DOE has two federal facilities available for disposal of mixed waste); p. 9, ¶ 15 (DOE able to find alternative disposal site for Rocky Flats mixed waste).

At most, Plaintiffs allege that it will be more costly and less convenient to ship mixed waste to other locations. This allegation is based on the flawed and arrogant assumption that Hanford is unconditionally available to accept mixed waste from other sites. However, even before the CPA was passed, Ecology was considering keeping off-site waste out of Hanford. Cusack Aff. ¶ W. Additionally, added cost and decreased convenience are insufficient to establish that the burdens to interstate commerce are clearly excessive in comparison to state interests. *Valley Bank of Nevada v. Plus System, Inc.*, 914 F.2d 1186, 1193 (9th Cir. 1990) ("commerce clause does not give an interstate business the right to conduct its business in what it considers the most efficient manner"); *see also Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 472-73 (1981) (burden on commerce not excessive when it amounts to inconvenience and financial burden).

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TRIDEC erroneously argues that Section 4 hinders interstate commerce by impacting the import of useful products. However, as discussed on pages 11-13 of this brief, Section 4 is limited by Ecology's existing HWMA permitting authority, and consequently does not apply to useful products. Thus, although Section 4 might operate to prohibit Framatome from storing its mixed waste on-site until it completes its cleanup, Section 4 does not prohibit Framatome from continuing to import useful products. Skinnarland Aff. ¶ M.

Last, Plaintiffs speculate that burdens to interstate commerce are excessive because other states could pass similar laws. However, the concern under the Commerce Clause is not that states will pass similar laws *per se*, but rather, that states may pass inconsistent laws in similar subject areas making it difficult to comply with conflicting regimes. *See*, *for example*, *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88-89 (1987); *Healy v. Beer Institute*, 491 U.S. 324, 336-37 (1989). If other states pass laws similar to the CPA, it would simply mean that other states have elected to use their regulatory authority over mixed waste and cleanup to embody the cleanup policy contained in CERCLA's off-site prohibition. This scenario raises no Commerce Clause concern.

If this Court disagrees that *Pike* governs the inquiry in this case, the next step would be to hold a fact-finding trial to determine whether Section 4 satisfies strict scrutiny. To withstand strict scrutiny, the State has the burden of showing that the law serves a clear local benefit and that there are no less discriminatory means available to accomplish that benefit. *Hunt*, 504 U.S. at 342. This determination is

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often factual and can only be decided after an evidentiary proceeding. *See, e.g.*, *Conservation Force*, 301 F.3d at 999 (whether Arizona's cap on non-resident hunting survives strict scrutiny is a factual question to be decided by trial court); *Taylor*, 477 U.S. at 144-46 (the empirical component of satisfying the strict scrutiny standard is to be established by the trial court).

If the Court agrees with the State that *Pike* governs the inquiry, the Court should find as a matter of law that the Plaintiffs do not meet their high burden of showing that this health and safety regulation violates the Commerce Clause.

B. Section 9 Does Not Impose a Constitutionally Impermissible Tax

1. The Mixed Waste surcharge is a reasonable service charge under RCRA

The Supremacy Clause prevents a state from imposing taxes on the federal government. *United States v. New Mexico*, 455 U.S. 720 (1982). However, a state may require the federal government to pay "reasonable fees" to help defray the costs of regulating federal entities. *State of Maine v. Dep't of the Navy*, 973 F.2d 1007 (1st Cir. 1992); *Jorling v. United States Dep't of Energy*, 218 F.3d 96 (3rd Cir. 2000); *Union Pacific Railroad Co. v. Public Utility Comm'n of the State of Oregon*, 899 F.2d 854 (9th Cir. 1990). Regulatory charges on a federal entity are reasonable "[s]o long as the charges do not discriminate against [federal] functions, are based on a fair approximation of use of the system, and are structured to produce revenues

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that will not exceed the total cost to the [state] Government of the benefits to be supplied." *Massachusetts v. United States*, 435 U.S. 444, 466-67 (1978).[35]

RCRA's waiver of sovereign immunity subjects federal facilities to "the payment of reasonable service charges" imposed by states to pay for "the control and abatement of solid waste or hazardous waste disposal and management." 42 U.S.C. § 6961(a). The RCRA waiver allows states to assess "any . . . nondiscriminatory charges that are assessed in connection with a Federal, State, interstate, or local solid waste or hazardous waste regulatory program." 42 U.S.C. § 6961(a).

The United States erroneously argues that the surcharge is invalid because its purpose is to fund public grants. U.S. Br. at 61-62. Both federal and state law recognize the important and legitimate role that public participation plays in the hazardous waste management and cleanup processes. RCRA and CERCLA include provisions requiring extensive public participation. Under RCRA, public participation "shall be provided for, encouraged, and assisted by the Administrator and the States." 42 U.S.C. § 6974(b). Under CERCLA, the federal government provides technical assistance grants to "facilitate public participation at all stages of remedial action." 42 U.S.C. § 9617(e)(2).

[35] In *Massachusetts*, the Court ruled on the validity of fees imposed by the federal government on the State of Massachusetts. Subsequent courts have found that the rationale used in *Massachusetts* applies equally to fees imposed by states on the federal government. *See, e.g., Maine*, 973 F.2d 1007; *Jorling*, 218 F.3d 96.

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Washington law also recognizes the need for public participation in cleanup decisions. MTCA and its implementing regulations require opportunities for public participation in cleanup decisions and authorizes the State to fund public participation through grants to persons and nonprofit organizations. RCW 70.105D.070(5) (establishment of public participation grant program); Chapter 173-321 WAC (application process, eligibility, and funding process for grants); WAC 173-340-600 (public notice and participation requirements for cleanup sites).

DOE itself has acknowledged that public participation is a necessary component in the cleanup process. The TPA includes specific provisions requiring public participation via a Community Relations Plan, developed and implemented by DOE. TPA Art. XLII, ¶ 128. As part of this Community Relations Plan, DOE encourages interested and eligible persons to apply for Washington State Public Participation Grants. *See* Community Relations Plan for the Tri-Party Agreement, January 2002, p. 9; Moore Aff. ¶ S, Ex. 1. *Also available* at http://www.hanford.gov/crp. The Community Relations Plan recognizes that "public involvement is essential to cleanup success" and provides strong incentive for the public to get involved:

> Cleanup at Hanford is one of the largest environmental challenges, as well as one of the most expensive. Public support for cleanup activities plays a vital role in ensuring that the Hanford Site receives adequate funding to continue cleanup progress. Public participation in the decision-making process results in better decision-making and more sustainable decisions.

Id. at iv.

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In light of this recognized need, the United States is wrong that public participation is not a valid basis for a regulatory fee. Effective public and local government participation requires an educated public to intelligently monitor events. Prior to passage of the CPA, local governments were not eligible for participation grants. Moore Aff. ¶ R. Persons who wanted grants for Hanford participation were required to compete with other eligible applicants to receive grants from the MTCA-created fund. *See id.* The CPA's surcharge will enable local governments to participate in cleanup decisions and will provide greater overall funding for public participation. The United States' cavalier dismissal of public participation grants as an unreasonable use of regulatory monies runs contrary to a series of laws that require and enable meaningful public participation. The surcharge is within RCRA's broad waiver of immunity.

2. The surcharge passes the *Massachusetts* test

A state regulatory charge will be upheld if: (1) the charge does not discriminate against federal functions; (2) the charge is based on a fair approximation of the use of the system; and (3) the charge is structured to produce revenues that will not exceed the total cost to the state government of the benefits to be supplied. *Massachusetts*, 435 U.S. at 466-67. The United States alleges that the Section 9 surcharge does not satisfy the first and third prongs of this test. U.S. Br. at 62-63.

On the first prong, the United States incorrectly argues that the charge discriminates because it applies only to Hanford. There are five mixed waste

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facilities in Washington potentially subject to the surcharge requirement. Moore Aff. ¶ H. Currently, both Hanford and Framatome appear to be subject. Moore Aff. ¶ O. Thus, the surcharge does not apply exclusively to Hanford.

Also related to the first prong, the United States argues that the method of assessing the surcharge is discriminatory. Again, the United States is wrong. The amount of the mixed waste surcharge is determined by a site's annual cleanup budget. The CPA defines the annual site cleanup budget for federal facilities as "the greater of the congressional budget request or appropriations of the federal government." RCW 70.105E.090(5) Although this provision applies only to federal facilities, this fact does not make it *per se* discriminatory. *Washington v. United States*, 460 U.S. 536 (1983). A purportedly discriminatory measure may in fact be merely an accommodation to federal constraints. *Id*. at 546 (finding provisions differentiating between tax assessments on private and federal facilities not discriminatory). "The State does not discriminate against the Federal Government . . . unless it treats someone else better than it treats them." *Id* at 544-45.

The CPA provision for determining the federal government's annual cleanup budget does not treat anyone "better" than it treats the federal government. Instead, it recognizes a genuine distinction between how a cleanup budget is calculated for the federal government versus how cleanup budgets are calculated for other parties. The federal budget process is inherently uncertain due to the need for congressional appropriation. *See* Brown Aff. ¶¶ H, I. This uncertainty does not exist for private

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parties because private parties' budgets are not subject to congressional appropriation. This uncertainty also does not exist for state facilities because the state controls its own appropriations process. Thus, Section 9 does not discriminate but merely recognizes a distinction between the federal budgeting process and other budgeting processes.

In relation to the third prong, the United States cannot demonstrate that the surcharge will produce revenues that exceed the benefits supplied. Section 9 requires that "[a]ny unused mixed waste surcharges assessed under this section . . . shall be utilized to reduce the mixed waste surcharge assessed the owner or operator of the facility in future years." RCW 70.150E.090(4)(b). Thus, if one year's surcharge produces income in excess of the use of public participation grants, the next year's surcharge will be decreased accordingly. Moore Aff. ¶ M. This mechanism makes the surcharge self-limiting and ensures that it will not produce revenues that exceed the costs of the benefits supplied.

The United States has failed to show that Section 9 does not meet the three-part *Massachusetts* test. Therefore, Section 9 must be upheld.

C. The Disclosures Required by Section 7 Are Valid

Section 7 of the CPA requires owners or operators of mixed waste facilities to disclose certain budget information in order to obtain HWMA permits. RCW 70.105E.070. The United States alleges that this requirement exceeds the waiver of immunity in RCRA and violates the executive process privilege. U.S. Br. at 63-65. The United States is wrong on both counts.

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1. The disclosures do not exceed the waiver of immunity in RCRA

The gist of the United States' argument is that the disclosures exceed the RCRA waiver because they encompass the projected annual cost of complying with "each applicable federal or state law governing investigation, cleanup, corrective action, closure, or health and safety of facilities at the site[.]" RCW 70.105E.070. Without analysis, the United States cursorily concludes that the disclosure requirement must exceed the waiver because "the RCRA waiver extends only to requirements that relate to the State's hazardous waste management program." U.S. Br. at 64.

The United States' argument is premised on the incorrect assumption that the disclosure requirement does not relate to the State's hazardous waste program. Contrary to the United States' position, the disclosure requirement is an important component of the State's hazardous waste management program. It allows Ecology to more effectively monitor a facility's ability to meet cleanup requirements. Specifically, Section 7 helps Ecology obtain a complete and accurate picture of a facility's ability to meet cleanup obligations by allowing Ecology to measure all compliance costs of a facility against the facility's existing budget. Since the requirement ties to the State's management of hazardous waste cleanup, it is within the RCRA waiver.

2. The disclosures do not violate the deliberative process privilege

The deliberative process privilege exempts a federal agency's predecisional communications from disclosure in order to protect government agencies'

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decision-making processes. *National Labor Relations Bd. (NLRB) v. Sears, Roebuck & Co*., 421 U.S. 132, 150-51 (1975); *Carter v. United States Dep't of Commerce*, 307 F.3d 1084 (9th Cir. 2002). "To fall within the deliberative process privilege, a document must be both predecisional and deliberative." *Carter*, 307 F.3d at 1089. Predecisional documents include "recommendations, draft documents, proposals, suggestions, and other subjective documents" that "reflect the personal opinions of the writer rather than the policy of the agency." *Carter*, 307 F.3d at 1089. A predecisional document is deliberative if "disclosure of [the] materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Carter*, 307 F.3d at 1089. A predecisional document is not deliberative if disclosure "poses a negligible risk of denying to agency decisionmakers the uninhibited advice which is so important to agency decisions." *NLRB*, 421 U.S. at 152, n.19.

Section 7 of the CPA requires disclosures from the federal government at three different points in the budget process: within 14 days after submission of the budget to Congress, within 14 days after final appropriation of funds, and within 14 days after a field request is submitted to a federal agency's headquarters for funding in fiscal years beyond the current fiscal year. The disclosures must include "a comparison of the cost estimate for all activity required by compliance orders, decrees, schedules, or agreements, with the funds requested and with the funds appropriated." RCW 70.105E.070.

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None of the three disclosures under the CPA require disclosure of deliberative information. First, budget requests to Congress are not protected by the deliberative process privilege because once the budget is submitted to Congress, it becomes part of the legislative process and is fully disclosable. *See, e.g.*, *American Society of Pension Actuaries v. IRS*, 746 F. Supp. 188 (D.D.C. 1990). Similarly, final appropriations of funds are not protected by the deliberative process privilege because, once passed by Congress, the budget becomes a public law and is published in the United States Statutes at Large, 1 U.S.C. § 112.

Last, field requests submitted to agency headquarters are not protected by the deliberative process privilege. The field requests are budget appropriation requests, not budget deliberations. The disclosures encompass objective economic information that compares cost estimates for cleanup projects to requested funds. The United States does not contend that disclosing these requests will discourage candid discussion within the agency or inhibit the agency's decision-making process. In fact, CERCLA already requires federal Superfund facilities (like Hanford) to provide the same objective cost comparisons required by Section 7 of the CPA. 42 U.S.C. § 9620(e)(5)(B) (requiring federal facilities to provide an annual report to Congress that includes specific cost estimates and budgetary proposals involved in each interagency agreement). Field requests are not protected by the deliberative process privilege.

The disclosures required by Section 7 do not exceed the RCRA waiver or violate the executive privilege exemption. Therefore, Section 7 should be upheld.

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D. The Cleanup Priority Act Does Not Violate the Contract Clause

Alone among the Plaintiffs, TRIDEC argues that the CPA is facially invalid because it unlawfully impairs existing contracts. TRIDEC Br. at 26-33. TRIDEC correctly recites the elements of the threshold Contract Clause inquiry: whether there is a contractual relationship; whether a change in law impairs that relationship; and whether the impairment is substantial.[36] TRIDEC Br. at 27, *citing General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). As a matter of law, TRIDEC fails to meet this threshold inquiry with any claim.

1. TRIDEC lacks standing and cannot show impairment of the Tri-Party Agreement

TRIDEC first claims that the CPA substantially impairs the Tri-Party Agreement. This claim fails on three bases. First, TRIDEC lacks standing to claim the TPA is impaired. Second, the terms of the TPA itself defeat any claim it is impaired. Third, TRIDEC's claim is not ripe.

[36] There is a three-step inquiry for determining whether a state law violates the Contract Clause. First, there must be a threshold showing that the law substantially impairs a contractual relationship. (This invokes the three elements cited by TRIDEC.) If the threshold inquiry is met, the court must next examine whether the state, in justification, has a significant and legitimate public purpose behind the regulation. If so, the court then examines whether "the adjustment of the rights and responsibilities of the contracting parties is based on reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." *RUI One Corp.*, 371 F.3d at 1147 (citations omitted). The "heightened scrutiny" TRIDEC argues should apply because the State is a party to the Tri-Party Agreement applies only if the Court reaches the third prong of the Contract Clause analysis. *RUI One Corp.*, 371 F.3d at 1152. As argued above, TRIDEC fails to make the threshold showing of substantial impairment.

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In order to have standing under the Contract Clause, a plaintiff must demonstrate that a contract has given the plaintiff vested rights, not merely an expectation. *See Dodge v. Bd. of Educ.*, 302 U.S. 74, 77-78 (1937); *Maricopa-Stanfield Irrigation & Drainage Dist. v. United States*, 158 F.3d 428 (9th Cir. 1998). While the Tri-Party Agreement does have a contractual element, *see United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236, n.10 (1975) ("consent decrees and orders . . . are treated as contracts for some purposes but not for others"), it was entered into by Ecology under the agency's HWMA authority to issue orders. TPA Art. I, ¶ 3.[37] Aside from the parties themselves, only intended third-party beneficiaries have potential standing to enforce consent orders as a contract. *Hook v. Arizona*, 972 F.2d 1012, 1014 (9th Cir. 1992); *Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280, 286 (D.C. Cir. 1993).[38]

Neither TRIDEC nor any of its members are parties to the TPA. *See* TPA Art. II, ¶ 8 (defining parties as "EPA, Ecology, and DOE"). Nor is TRIDEC (nor any of its members) a third-party beneficiary of the TPA. To create a third-party beneficiary, contracting parties must have intended to assume a direct obligation to the beneficiary at the time they entered the contract. *Hairston v. Pacific 10*

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[37] The TPA can be accessed at http://www.hanford.gov/?page=91&parent=0.

[38] A long line of state cases addressing insurance contracts hold that even intended third-party beneficiaries do not have standing to claim contract impairment. *See, e.g., In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002) (named beneficiaries lacked standing to claim impairment); *Mearns v. Scharbach*, 103 Wash. App. 498 (2000); *Matter of Estate of Dobert*, 963 P.2d 327 (Ariz. 1998). Since TRIDEC is not a third-party beneficiary of the TPA, the Court need not reach whether such holdings would apply to a consent order.

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Conference, 101 F.3d 1315, 1320 (9th Cir. 1996). There is no such intent in the TPA. *See generally*, TPA Art. III (Purpose). Indeed, where third parties such as DOE's contractors are mentioned, it is in the context of clarifying that such parties are *not* included within the agreement. *See* TPA Art. II, ¶ 13 ("DOE remains obligated by this Agreement *regardless of whether it carries out the terms through agents, contractors, and/or consultants.* Such agents, contractors, and/or consultants shall be required to comply with the terms of this Agreement, *but the Agreement shall be binding and enforceable only against the parties to the Agreement*."); TPA Art. XLVI, ¶ 140. ("EPA and Ecology *shall not be held as a Party to any contract entered into by DOE to implement the requirements of this Agreement*"). TRIDEC lacks standing to claim impairment of the TPA.

Even if TRIDEC had standing, the Tri-Party Agreement's terms defeat any claim it is impaired by the CPA. The Tri-Parties have agreed that in the event of future inconsistency between the TPA and governing law, the TPA will be modified to conform to such changes. TPA Art. L (Compliance with Applicable Laws), ¶ 157. This term is fatal to any claim of impairment based on the CPA. *See RUI One Corp.*, 371 F.3d at 1147 (lease term mandating that plaintiff "comply with all applicable laws" meant plaintiff agreed lease was subject to future changes in law).

Even ignoring this, TRIDEC's sole example of "impairment" still fails as a matter of law. TRIDEC argues that the CPA's Subsection 6(3) (which dictates certain considerations *if* underground tanks are "landfill closed") impairs the Tri-Party Agreement's 2024 and 2028 milestones for single-shell tank closure (M-45)

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and tank waste treatment (M-62). TRIDEC Br. at 28-29. M-45, however, is silent concerning the *method* by which tank closure is to be achieved. Cusack Aff. ¶ K; *see generally*, TPA Action Plan Appendix D, M-45 series. As a result, there is no "contract" to be impaired. *RUI One Corp.*, 371 F.3d at 1147 (whether "contractual relationship" exists is not determined by whether there is a contract, but by whether there is a "contractual agreement regarding the specific . . . terms allegedly at issue").

Finally, Ecology has yet to determine whether Hanford's tanks will be "clean closed" or "landfill closed." Cusack Aff. ¶ S. In addition, there is the strong prospect that DOE will breach both M-45 and M-62 for reasons wholly unrelated to the CPA. Cusack Aff. ¶¶ R-U. Based on these facts, TRIDEC's claim of impairment under Subsection 6(3) is speculative and unripe.

2. TRIDEC's other claims fail to demonstrate impairment

TRIDEC argues the Battelle, Framatome, and other unspecified contracts are impaired by the CPA's mixed waste import moratorium because the moratorium extends beyond hazardous waste to useful products. *See* TRIDEC Br. at 29-31. However, as discussed on pages 11-13, *supra*, Ecology does not interpret the moratorium to apply to useful products. TRIDEC builds a strawman: its claim of impairment depends on a reading of the CPA Ecology does not intend to implement. TRIDEC's claims are thus purely speculative and not ripe for review.[39]

[39] Notably, the injunction staying the effect of the CPA applies only to federal facilities and does not apply to non-federal entities such as Framatome. In the one year-plus the CPA has been in effect, Ecology has taken no action under the

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TRIDEC fails to satisfy the threshold analysis of the Contract Clause under any of its claims. Summary judgment on TRIDEC's claims should therefore be denied.

E. Provisions of the Cleanup Priority Act are Severable

Severability of state statutes is governed by state law. *Brockett v. Spokane Arcade*, 472 U.S. 491, 506-07 (1985). Under Washington law, the provisions of a statute are severable unless "the constitutional and unconstitutional provisions are so connected that the legislature would not have passed one without the other, or that the remainder of the statute is useless to accomplish the legislative purpose." *Mt. Hood Beverage Co. v. Constellation Brands, Inc.* 149 Wash.2d 98, 118, 63 P.3d 779 (2003). The party alleging unconstitutionality bears the burden of proving that the portions of a statute are not severable. *State v. Spiers*, 119 Wash. App. 85, n.13, 79 P.3d 30 (2003). A statute need not contain a severability clause in order for its provisions to be severable. *Hoffman*, 154 Wash.2d at 748.

Plaintiffs argue that if any part of the CPA is declared unconstitutional, the entire Act must be invalidated. U.S. Br. at 65; TRIDEC Br. at 33-36. This is untrue. Although each provision of the CPA is important for achieving cleanup, the individual sections are not so intertwined that the entire statute must fall if one or

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CPA that impairs Framatome's contracts. To the contrary, Ecology has informed one Washington business and TRIDEC member (IsoRay) that under Ecology's interpretation, the CPA does not apply to the business as a "facility." Skinnarland Aff. ¶ M, Ex. 1.

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more subsections are invalid. To the extent the Court declares certain sections or applications unconstitutional, the remaining sections or applications should stand.

Courts apply both "text" and "application" severability to avoid total invalidation of a statute. *Brockett* presents a classic example of "text severability," where the Court eliminated the word "lust" from a Washington statute regulating pornography and left the rest of the statute intact. *Brockett*, 472 U.S. at 505-07. Although applying text severability, *Brockett* also recognized that application severability could apply under appropriate circumstances. *Id.* at 505 (statute should not be invalidated entirely simply because of invalidity of some applications).

The Supreme Court recently affirmed its preference for application severability as an alternative to total invalidation of a statute: "[w]e prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other portions in force . . . or to sever its problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of Northern New England*, Supreme Court No. 04-1144**,** 2005 WL 1900328, slip op. at 7 (Jan. 18, 2006), attached. The *Ayotte* court declined to invalidate an abortion parental notification statute that did not include a constitutionally required exception to protect minors' health. Rather than invalidate the statute, the Court held that the district court can issue "a declaratory judgment and injunction prohibiting the statute's unconstitutional application." *Id.* at 9. This approach serves three important, interrelated principles: (1) courts should not nullify more of a legislature's work than necessary; (2) it is axiomatic that a statute may be invalidly applied to one set

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of circumstances, yet validly applied to another; and (3) the "normal rule" is that partial, rather than facial, invalidation is the required course for a reviewing court. *Id.* at 7.

If the Court finds both valid and invalid interpretations of the CPA, the Court could sever the invalid applications only. However, since this case arises as a facial challenge, the Court may not need to reach the issue since the Court should uphold the statute as long as any constitutional applications exist. If the Court ultimately finds that some portions or applications of the statute are unconstitutional, the State joins the United States in requesting another round of briefing on severability.

VI. CONCLUSION

The Plaintiffs have failed to meet their burden of establishing that the Cleanup Priority Act is facially unconstitutional. Thus, the State respectfully asks the Court to find that the Plaintiffs' claims fail as a matter of law and, therefore, to dismiss the Plaintiffs' complaints.

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

AYOTTE, ATTORNEY GENERAL OF NEW HAMPSHIRE *v.* PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 04–1144. Argued November 30, 2005—Decided January 18, 2006

New Hampshire's Parental Notification Prior to Abortion Act, in relevant part, prohibits physicians from performing an abortion on a pregnant minor until 48 hours after written notice of such abortion is delivered to her parent or guardian. The Act does not require notice for an abortion necessary to prevent the minor's death if there is insufficient time to provide notice, and permits a minor to petition a judge to authorize her physician to perform an abortion without parental notification. The Act does not explicitly permit a physician to perform an abortion in a medical emergency without parental notification. Respondents, who provide abortions for pregnant minors and expect to provide emergency abortions for them in the future, filed suit under 42 U. S. C. §1983, claiming that the Act is unconstitutional because it lacks a health exception and because of the inadequacy of the life exception and the judicial bypass' confidentiality provision. The District Court declared the Act unconstitutional and permanently enjoined its enforcement, and the First Circuit affirmed.

Held: If enforcing a statute that regulates access to abortion would be unconstitutional in medical emergencies, invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief. Pp. 4–10.

(a) As the case comes to this Court, three propositions are established. First, States have the right to require parental involvement when a minor considers terminating her pregnancy. Second, a State may not restrict access to abortions that are "'necessary, in appropriate medical judgment for preservation of the life or health of the

mother.'" *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 879 (plurality opinion). Third, New Hampshire has not taken issue with the case's factual basis: In a very small percentage of cases, pregnant minors need immediate abortions to avert serious and often irreversible damage to their health. New Hampshire has conceded that, under this Court's cases, it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks. Pp. 4–6.

(b) Generally speaking, when confronting a statute's constitutional flaw, this Court tries to limit the solution to the problem, preferring to enjoin only the statute's unconstitutional applications while leaving the others in force, see *United States* v. *Raines*, 362 U. S. 17, 20–22, or to sever its problematic portions while leaving the remainder intact, *United States* v. *Booker*, 543 U. S. 220, 227–229. Three interrelated principles inform the Court's approach to remedies. First, the Court tries not to nullify more of a legislature's work than is necessary. Second, mindful that its constitutional mandate and institutional competence are limited, the Court restrains itself from "rewrit[ing] state law to confirm it to constitutional requirements." *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383, 397. Third, the touchstone for any decision about remedy is legislative intent. After finding an application or portion of a statute unconstitutional, the Court must ask: Would the legislature have preferred what is left of its statute to no statute at all? See generally, *e.g.*, *Booker*, *supra*, at 227. Here, the courts below chose the most blunt remedy—permanently enjoining the Act's enforcement and thereby invalidating it entirely. They need not have done so. In *Stenberg* v. *Carhart*, 530 U. S. 914—where this Court invalidated Nevada's "partial birth abortion" law in its entirety for lacking a health exception—the parties did not ask for, and this Court did not contemplate, relief more finely drawn, but here New Hampshire asked for and respondents recognized the possibility of a more modest remedy. Only a few applications of the Act would present a constitutional problem. So long as they are faithful to legislative intent, then, in this case the lower courts can issue a declaratory judgment and an injunction prohibiting the Act's unconstitutional application. On remand, they should determine in the first instance whether the legislature intended the statute to be susceptible to such a remedy. Pp. 6–10.

(c) Because an injunction prohibiting unconstitutional applications or a holding that consistency with legislative intent requires invalidating the statue *in toto* should obviate any concern about the Act's life exception, this Court need not pass on the lower courts' alternative holding. If the Act survives in part on remand, the Court of Appeals should address respondents' separate objection to the judicial

Syllabus

bypass' confidentiality provision. P. 10.

390 F. 3d 53, vacated and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 04–1144

KELLY A. AYOTTE, ATTORNEY GENERAL OF NEW HAMPSHIRE, PETITIONER *v.* PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[January 18, 2006]

JUSTICE O'CONNOR delivered the opinion of the Court.

We do not revisit our abortion precedents today, but rather address a question of remedy: If enforcing a statute that regulates access to abortion would be unconstitutional in medical emergencies, what is the appropriate judicial response? We hold that invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief.

I

A

In 2003, New Hampshire enacted the Parental Notification Prior to Abortion Act. N. H. Rev. Stat. Ann. §§132:24–132:28 (Supp. 2004). The Act prohibits physicians from performing an abortion on a pregnant minor (or a woman for whom a guardian or conservator has been appointed) until 48 hours after written notice of the pending abortion is delivered to her parent or guardian. §132:25(I). Notice may be delivered personally or by

certified mail. §§132:25(II), (III). Violations of the Act are subject to criminal and civil penalties. §132:27.

The Act allows for three circumstances in which a physician may perform an abortion without notifying the minor's parent. First, notice is not required if "[t]he attending abortion provider certifies in the pregnant minor's record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." §132:26(I)(a). Second, a person entitled to receive notice may certify that he or she has already been notified. §132:26(I)(b). Finally, a minor may petition a judge to authorize her physician to perform an abortion without parental notification. The judge must so authorize if he or she finds that the minor is mature and capable of giving informed consent, or that an abortion without notification is in the minor's best interests. §132:26(II). These judicial bypass proceedings "shall be confidential and shall be given precedence over other pending matters so that the court may reach a decision promptly and without delay," and access to the courts "shall be afforded [to the] pregnant minor 24 hours a day, 7 days a week." §§132:26(II)(b), (c). The trial and appellate courts must each rule on bypass petitions within seven days. *Ibid.*

The Act does not explicitly permit a physician to perform an abortion in a medical emergency without parental notification.

B

Respondents are Dr. Wayne Goldner, an obstetrician and gynecologist who has a private practice in Manchester, and three clinics that offer reproductive health services. All provide abortions for pregnant minors, and each anticipates having to provide emergency abortions for minors in the future. Before the Act took effect, respondents brought suit under 42 U. S. C. §1983, alleging that the Act is unconstitutional because it fails "to allow a

physician to provide a prompt abortion to a minor whose health would be endangered" by delays inherent in the Act. App. 10 (Complaint, ¶24). Respondents also challenged the adequacy of the Act's life exception and of the judicial bypass' confidentiality provision.

The District Court declared the Act unconstitutional, see 28 U. S. C. §2201(a), and permanently enjoined its enforcement. It held, first, that the Act was invalid for failure "on its face . . . to comply with the constitutional requirement that laws restricting a woman's access to abortion must provide a health exception." *Planned Parenthood of Northern New Eng.* v. *Heed,* 296 F. Supp. 2d 59, 65 (NH 2003). It also found that the Act's judicial bypass would not operate expeditiously enough in medical emergencies. In the alternative, the District Court held the Act's life exception unconstitutional because it requires physicians to certify with impossible precision that an abortion is "necessary" to avoid death, and fails to protect their good faith medical judgment.

The Court of Appeals for the First Circuit affirmed. Citing our decisions in *Stenberg* v. *Carhart,* 530 U. S. 914, 929–930 (2000), *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833, 879 (1992) (plurality opinion), and *Roe* v. *Wade,* 410 U. S. 113, 164–165 (1973), it observed: "Complementing the general undue burden standard [for reviewing abortion regulations], the Supreme Court has also identified a specific and independent constitutional requirement that an abortion regulation must contain an exception for the preservation of the pregnant woman's health." *Planned Parenthood of Northern New Eng.* v. *Heed,* 390 F. 3d 53, 58 (2004). It went on to conclude that the Act is unconstitutional because it does not contain an explicit health exception, and its judicial bypass, along with other provisions of state law, is no substitute. The Court of Appeals further found the Act unconstitutional because, in its view, the life exception forces physicians to

gamble with their patients' lives by prohibiting them from performing an abortion without notification until they are certain that death is imminent, and is intolerably vague. Because the district and appellate courts permanently enjoined the Act's enforcement on the basis of the above infirmities, neither reached respondents' objection to the judicial bypass' confidentiality provision.

We granted certiorari, 544 U. S. __ (2005), to decide whether the courts below erred in invalidating the Act in its entirety because it lacks an exception for the preservation of pregnant minors' health. We now vacate and remand for the Court of Appeals to reconsider its choice of remedy.

II

As the case comes to us, three propositions—two legal and one factual—are established. First, States unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy, because of their "strong and legitimate interest in the welfare of [their] young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." *Hodgson* v. *Minnesota*, 497 U. S. 417, 444–445 (1990) (opinion of STEVENS, J.).[1] Accordingly, we have long upheld state parental

[1]Forty-four States, including New Hampshire, have parental involvement (that is, consent or notification) laws. Thirty-eight of those laws have explicit exceptions for health or medical emergencies. Ala. Code §26–21–5 (1992); Alaska Stat. §18.16.060 (2004); Ariz. Rev. Stat. Ann. §36–2152(G)(2) (West 2003); Ark. Code Ann. §§20–16–802(2), 20–16–805(1) (Supp. 2005); Cal. Health & Safety Code Ann. §123450 (West 1996); Colo. Rev. Stat. §12–37.5–103(5) (2004); Del. Code Ann., Tit. 24, §§1782(d), 1787 (1997); Fla. Stat. Ann. §§390.01114(2)(d), (3)(b) (West Supp. 2006); Ga. Code Ann. §15–11–116 (2005); Idaho Code §18–609A(1)(a)(v) (Lexis 2005); Ill. Comp. Stat., ch. 750, §70/10 (West 2004); Ind. Code §16–34–2–4 (West 2004); Iowa Code §135L.3 (2005); Kan. Stat. Ann. §65–6705(j)(1)(B) (2002); Ky. Rev. Stat. Ann. §§311.720, 311.732 (West Supp. 2005); La. Stat. Ann. §40:1299.35.12 (West Supp.

involvement statutes like the Act before us, and we cast no doubt on those holdings today. See, *e.g.*, *Lambert* v. *Wicklund*, 520 U. S. 292 (1997) *(per curiam)*; *Casey*, *supra*, at 899 (joint opinion); *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 510–519 (1990); *Hodgson*, 497 U. S., at 461 (O'CONNOR, J., concurring in part and concurring in judgment in part); *id.*, at 497–501 (KENNEDY, J., concurring in judgment in part and dissenting in part).[2]

Second, New Hampshire does not dispute, and our

2005); Mass. Gen. Laws, ch. 112, §12S (West 2004); Mich. Comp. Laws §§722.902(b), 722.905 (2002); Miss. Code Ann. §41–41–57 (2005); Mont. Code Ann. §§50–20–203(5), 50–20–208 (2005); Neb. Rev. Stat. §71–6906(1) (2003); Nev. Rev. Stat. §442.255(1) (2003); N. J. Stat. Ann. §§9:17A–1.3, 9:17A–1.6 (West 2002); N. M. Stat. Ann. §30–5–1 (2004); N. C. Gen. Stat. Ann. §90–21.9 (Lexis 2003); N. D. Cent. Code Ann. §§14–02.1–03(1), 14–02.1–03.1(2) (Lexis 2004); Ohio Rev. Code Ann. §2919.121(D) (Lexis 2003); Okla. Stat., Tit. 63, §1–740.2(B) (West Supp. 2006); 18 Pa. Cons. Stat. §§3203, 3206 (2002); R. I. Gen. Laws §23–4.7–4 (1996); S. C. Code Ann. §44–41–30(C)(1) (2002); 2005 S. D. Laws p. 189; Tenn. Code Ann. §37–10–305 (2005); Tex. Occ. Code Ann. §164.052(a)(19) (West Supp. 2005), Tex. S. B. 419 (2005); Utah Code Ann. §§76–7–301(2), 76–7–305 (Lexis Supp. 2005); Va. Code Ann. §18.2–76 (2004); W. Va. Code §16–2F–3 (Lexis 2001); Wis. Stat. §48.375 (2003–2004). Two States give physicians sufficient discretion to perform an abortion to protect minors' health. Me. Rev. Stat. Ann., Tit. 22, §1597–A (2004); Md. Health Code Ann. §20–103 (2005). Four, including New Hampshire, make no exception for minors' health in an emergency. N. H. Stat. §132:26 (2005); Minn. Stat. §144.343 (2004); Mo. Rev. Stat. §188.028 (2000); Wyo. Stat. Ann. §35–6–118 (2003).

[2]It is the sad reality, however, that young women sometimes lack a loving and supportive parent capable of aiding them "to exercise their rights wisely." *Hodgson*, 497 U. S., at 444; see *id.*, at 450–451 and n. 36 (holding unconstitutional a statute requiring notification of both parents, and observing that "the most common reason" young women did not notify a second parent was that the second parent "was a child- or spouse-batterer, and notification would have provoked further abuse" (citation omitted)). See also Department of Health and Human Services, Administration on Children, Youth and Families, Child Maltreatment 2003, p. 63 (2005) (parents were the perpetrators in 79.7% of cases of reported abuse or neglect).

precedents hold, that a State may not restrict access to abortions that are "'necessary, in appropriate medical judgment, for preservation of the life or health of the mother.'" *Casey*, 505 U. S., at 879 (plurality opinion) (quoting *Roe*, 410 U. S., at 164–165); see also *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 768–769 (1986); *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476, 482–486 (1983) (opinion of Powell, J.); *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 79 (1976).

Third, New Hampshire has not taken real issue with the factual basis of this litigation: In some very small percentage of cases, pregnant minors, like adult women, need immediate abortions to avert serious and often irreversible damage to their health. See 296 F. Supp. 2d, at 65, n. 4.

New Hampshire has maintained that in most if not all cases, the Act's judicial bypass and the State's "competing harms" statutes should protect both physician and patient when a minor needs an immediate abortion. See N. H. Rev. Stat. Ann. §627:3(I) (1996) (for criminal liability, "[c]onduct which the actor believes to be necessary to avoid harm to . . . another is justifiable if the desirability and urgency of avoiding such harm outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the statute defining the offense charged"); §627:1 (similar for civil liability). But the District Court and Court of Appeals found neither of these provisions to protect minors' health reliably in all emergencies. 296 F. Supp. 2d, at 65–66; 390 F. 3d, at 61–62. And New Hampshire has conceded that, under our cases, it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks. See Reply Brief for Petitioner 2, 8, 11; Tr. of Oral Arg. 6, 14.

III

We turn to the question of remedy: When a statute

restricting access to abortion may be applied in a manner that harms women's health, what is the appropriate relief? Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, see *United States* v. *Raines*, 362 U. S. 17, 20–22 (1960), or to sever its problematic portions while leaving the remainder intact, *United States* v. *Booker*, 543 U. S. 220, 227–229 (2005).

Three interrelated principles inform our approach to remedies. First, we try not to nullify more of a legislature's work than is necessary, for we know that "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Regan* v. *Time, Inc.*, 468 U. S. 641, 652 (1984) (plurality opinion). It is axiomatic that a "statute may be invalid as applied to one state of facts and yet valid as applied to another." *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 289 (1921). Accordingly, the "normal rule" is that "partial, rather than facial, invalidation is the required course," such that a "statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact." *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 504 (1985); see also *Tennessee* v. *Garner*, 471 U. S. 1 (1985); *United States* v. *Grace*, 461 U. S. 171, 180–183 (1983).

Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from "rewrit[ing] state law to conform it to constitutional requirements" even as we strive to salvage it. *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383, 397 (1988). Our ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly we have already articulated the background constitutional rules at issue and how easily we can articulate the remedy. In *United States* v. *Grace*, *supra*, at

180–183, for example, we crafted a narrow remedy much like the one we contemplate today, striking down a statute banning expressive displays only as it applied to public sidewalks near the Supreme Court but not as it applied to the Supreme Court Building itself. We later explained that the remedy in *Grace* was a "relatively simple matter" because we had previously distinguished between sidewalks and buildings in our First Amendment jurisprudence. *United States* v. *Treasury Employees*, 513 U. S. 454, 479, n. 26 (1995). But making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a "far more serious invasion of the legislative domain" than we ought to undertake. *Ibid.*

Third, the touchstone for any decision about remedy is legislative intent, for a court cannot "use its remedial powers to circumvent the intent of the legislature." *Califano* v. *Westcott*, 443 U. S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part); see also *Dorchy* v. *Kansas*, 264 U. S. 286, 289–290 (1924) (opinion for the Court by Brandeis, J.). After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all? See generally *Booker*, *supra*, at 227; *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 191 (1999); *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684 (1987); *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U. S. 210, 234 (1932); *The Employers' Liability Cases*, 207 U. S. 463, 501 (1908); *Allen* v. *Louisiana*, 103 U. S. 80, 83–84 (1881); *Trade-Mark Cases*, 100 U. S. 82, 97–98 (1879). All the while, we are wary of legislatures who would rely on our intervention, for "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside" to announce to whom the statute may be applied. *United*

States v. *Reese*, 92 U. S. 214, 221 (1876). "This would, to some extent, substitute the judicial for the legislative department of the government." *Ibid.*

In this case, the courts below chose the most blunt remedy—permanently enjoining the enforcement of New Hampshire's parental notification law and thereby invalidating it entirely. That is understandable, for we, too, have previously invalidated an abortion statute in its entirety because of the same constitutional flaw. In *Stenberg*, we addressed a Nebraska law banning so-called "partial birth abortion" unless the procedure was necessary to save the pregnant woman's life. We held Nebraska's law unconstitutional because it lacked a health exception. 530 U. S., at 930 (lack of a health exception was an "independent reaso[n]" for finding the ban unconstitutional). But the parties in *Stenberg* did not ask for, and we did not contemplate, relief more finely drawn.

In the case that is before us, however, we agree with New Hampshire that the lower courts need not have invalidated the law wholesale. Respondents, too, recognize the possibility of a modest remedy: They pleaded for any relief "just and proper," App. 13 (Complaint), and conceded at oral argument that carefully crafted injunctive relief may resolve this case, Tr. of Oral Arg. 38, 40. Only a few applications of New Hampshire's parental notification statute would present a constitutional problem. So long as they are faithful to legislative intent, then, in this case the lower courts can issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application.

There is some dispute as to whether New Hampshire's legislature intended the statute to be susceptible to such a remedy. New Hampshire notes that the Act contains a severability clause providing that "[i]f any provision of this subdivision or the application thereof to any person or circumstance is held invalid, such invalidity shall not

affect the provisions or applications of this subdivision which can be given effect without the invalid provisions or applications." §132:28. Respondents, on the other hand, contend that New Hampshire legislators preferred no statute at all to a statute enjoined in the way we have described. Because this is an open question, we remand for the lower courts to determine legislative intent in the first instance.

IV

Either an injunction prohibiting unconstitutional applications or a holding that consistency with legislative intent requires invalidating the statute *in toto* should obviate any concern about the Act's life exception. We therefore need not pass on the lower courts' alternative holding. Finally, if the Act does survive in part on remand, the Court of Appeals should address respondents' separate objection to the judicial bypass' confidentiality provision. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

PROOF OF SERVICE

I hereby certify that on January 23, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to all parties of record.

DATED this 23rd day of January, 2006, in Olympia, Washington.

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